83-743

CASE #_____

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UNITED STATES SUPREME COURT

October, 1983 Term

ARIZONA PUBLIC SERVICE COMPANY, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 387.	PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Is the National Labor Relations Board's (the "NLRB" or "Board") refusal to conduct a self-determination election among Arizona Public Service Company's ("APS")[1] Palo Verde Nuclear Generating Station employees (the "Palo Verde employees") to determine whether or not a majority of those employees wish to become part of an existing bargaining unit or remain unrepresented an unwarranted departure from well established judicial and NLRB precedent and in derogation of the NLRB's duties pursuant to §§7 and 9 of the National Labor Relations Act (the "Act")?

[1]There are no parent companies, subsidiaries (other than wholly owned subsidiaries) or affiliates of APS.

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JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Ninth Circuit filed and entered its Judgment in this matter on January 10, 1983, enforcing a bargaining order of the NLRB. APS' Petition for Rehearing/Suggestion for Rehearing En Banc was denied on July 15, 1983.

Pursuant to §10(e) of the Act, this Court has jurisdiction to review the Judgment and Order upon writ of certiorari.

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STATEMENT OF THE CASE

(a) *Special and Important Reasons for Granting the Petition.*

The NLRB disenfranchised the Palo Verde employees by refusing to afford them an NLRB conducted, secret ballot, self-determination election.[2] Instead, the NLRB summarily accreted the employees into an existing collective bargaining unit. The NLRB thereby imposed International Brotherhood of Electrical Workers, Local 387 ("Union or Local 387") as the employees' exclusive collective bargaining representative, without regard to their actual wishes. In so ruling, the NLRB erroneously failed to apply its own standards and precedents and ignored conclusive record evidence that these employees possess sufficient separate group identity to give rise to the right to self-determination.

By affirming the NLRB's order, the Ninth Circuit Court of Appeals sanctioned this misapplication of the law and thereby denied the Palo Verde employees the protections and rights guaranteed by §§7 and 9 of the Act.

This Court has not addressed the question of the appropriate applicable criteria to require elections in this and like circumstances. APS submits that this Court should take the opportunity to do so presented by this case, for the NLRB's Order constitutes a precedent that will affect not only this group of presently almost five hundred employees (and ultimately as many as twelve hundred), but also thousands of employees employed by public utilities and by other employers across the nation. Furthermore, the NLRB decision is not only contrary to its own well established precedent in this area, but also to a recent, well-reasoned state court decision. See *School Board, infra*, at page 12.

[2]In a "self-determination" election, a group of employees is given a choice to join an existing bargaining unit or to remain unrepresented. The group must have a separate group identity, although for other reasons (here, the established principle of systemwide bargaining units in the public utility industry) a separate bargaining unit for the group would be inappropriate. (see argument, *infra* pp. 12-16).

(b) *Background*

APS is a public utility engaged in supplying electrical power to commercial enterprises and homes throughout the State of Arizona. (R.2, L.12-24.)[2] Since before 1947, APS has recognized the Union as the collective bargaining representative of many of its employees employed at its hydrogenerating and fossil fuel power generating plants in Arizona. (R. 442.)

Over the years, APS has added a number of generating plants into its system, either by acquisition of an existing plant or by construction of a new facility. With respect to the newly acquired plants, the labor organizations which represented the employees at those plants (mostly sister locals of the Union) prior to the acquisition by APS, were merged into Local 387. Therefore, those employees were incorporated into Local 387's unit. Similarly, with respect to new plants built by APS, the vast majority of the employees at such plants were Local 387's unit members transferred from unit positions in existing bargaining unit facilities to the new plants. (R.422, L.5-R. 467, L.18.) In all cases, APS was advised by the Union that it represented a majority of said employees.

Aside from newly acquired or built plants, the record herein *conclusively* establishes that new groups of employees have been added into the existing Local 387 bargaining unit *only through Board certifications issued after Board conducted secret ballot elections*. (R.493, L.8-R.495, L.21; R.9, L.17-R.12, L.15; R.21, L.2-7; R.22, L.9-16; R.19, L.1-4; E. Exh. 1; *See* for example, Cases 28-CB-1157; 21-RC-4242 [Meter readers]; 28-RC-2127 [Warehouseman]; 28-RC-3221 [Fuel Specialists]; 28-RC-3213 [Cathodic Protection Testers];

[2]References to the record of the underlying NLRB representation hearing will be designated by "R" followed by the appropriate page number or numbers and "L" followed by the appropriate line number or numbers; Exhibits will be designated as Employer ("E"), Union ("U"), or Joint ("Jt"), exhibits ("Exh."), followed by the appropriate number or numbers; references to the Appendix will be designated "APP." followed by the appropriate page ("p.") number or numbers.

28-RC-3587 [Auto Parts Clerks].) (NLRB certifications attached at APP. p. 56-61) It is important to emphasize that consistent with this long established practice, Local 387 recently filed an RC Petition with NLRB Region 28, seeking a Board conducted secret ballot election among some of APS' Credit Department employees, claiming that this "fringe" group was entitled to self-determination. Case No. 28-RC-4201. (APP. p. 88).

The current collective bargaining agreement between APS and the Union is effective from April 1, 1982, to April 1, 1984, and covers a unit of employees employed at APS' six fossil fuel and hydrogenerating plants, as well as several roving maintenance crews. The terms of the collective bargaining agreement do not cover any of the Palo Verde employees. The bargaining unit consists of less than one half of the approximately eight thousand APS employees. (R. 471-472, Exh. 1.)

(c) *The Palo Verde Nuclear Generating Station*

In 1972, APS began construction of its first and only nuclear generating station in a sparsely populated, desert area approximately 55 miles from the APS headquarters in Phoenix, Arizona. When completed, it will consist of three (3) nuclear reactors. Water for cooling the reactors will be provided by a water reclamation facility (WRF), that will be the only such facility in the APS system.

The Palo Verde Nuclear Generating Station ("Palo Verde") is owned by a consortium of public utility companies which operate in the southwest, consisting of APS, which owns a 29.1% interest, Salt River Project, Southern California Edison Company, Public Service Company of New Mexico, and El Paso Electric Company. Once operational, the Salt River Project will operate the switchyard and APS will operate the Plant.

APS began employing employees at the Palo Verde in 1979 to take over and test the systems completed by the plant builders. The APS employee complement at the Palo Verde plant at the time of the 1981 NLRB hearing was approximately sixty-two employees. Only twelve to thirteen of those employees were previously employed in Local 387 bargaining unit positions at other APS facilities. This number of transferred employees is in notable contrast to the situation presented by past plant acquisitions or construction, where, as emphasized above, it was clear that the Union possessed majority representational status at the time of recognition demands. The dramatic technological differences which exist between fossil power plants and nuclear plants account for APS' inability to man Palo Verde with employees transferred from its non-nuclear facilities. (R. 38; R. 62.)

Currently there are approximately five hundred (500) nonsupervisory employees employed by APS at Palo Verde. Only twenty-seven (27) of these employees were previously employed by APS in bargaining unit positions at other facilities. Ultimately, there will be up to twelve hundred nonsupervisory employees employed at Palo Verde.

(d) *Procedural Posture*

On December 15, 1980, in response to repeated recognitional demands asserted by representatives of Local 387, APS filed an "RM" election Petition with the Board, pursuant to §9(c)(1)(B) of the Act ("RM" Petition), requesting that a secret ballot election among the Palo Verde employees be conducted by the Board to determine whether said employees wished to be represented for purposes of collective bargaining by Local 387. (APP. p. 89.)

The reason for APS' election Petition was that the

Union had not only refused to provide any evidence that it represented a majority of APS' Palo Verde employees, but in fact openly admitted that *it did not represent a majority of those employees. The Union repeatedly conceded this fact throughout the NLRB and court proceedings.* (E. Exh.2(b); R.353, L.21-R.354 L.14; R.354, L.17-R.355, L.9; R.368, L.7-10; R.496, L.12-14.) Accordingly, APS declined to recognize the Union as the exclusive bargaining representative of its Palo Verde employees, until it was certified as such by the NLRB, after a secret ballot employee election was conducted under the NLRB supervision. (R.6, L.11-16.)

The Palo Verde employees themselves supported the position taken by APS with respect to the Union's demands, by filing their own Petition with the NLRB on June 25, 1981, requesting an election. The NLRB refused to entertain the employees' petition. Copies of the employees' Petition and of the NLRB response are set forth at APP. p. 90-93.

The Union opposed an election among the Palo Verde employees. Instead, it filed a Unit Clarification (UC) Petition on December 15, 1980, seeking accretion of the employees into its unit without an election among the affected employees. (APP. p. 94.)

On February 11, 1981, after a lengthy hearing on both the RM and UC Petitions in Phoenix, Arizona, the Regional Director for NLRB Region 28 transferred the case directly to the NLRB, without rendering a decision. The NLRB issued its Decision and Order on June 5, 1981 (APP. p. 28-46), dismissing APS' Petition and accreting the Palo Verde employees into Local 387's unit without an election. On December 3, 1981, the NLRB summarily ordered APS to bargain with Local 387 as the Palo Verde employees' exclusive, i.e. majority collective bargaining representative. (APP. p. 47-71.)

On January 10, 1983, the U.S. Court of Appeals for the Ninth Circuit enforced the Board's bargaining order on the ground that the Board's order accreting the Palo Verde employees into Local 387's unit without an election was not "clearly arbitrary and capricious." (APP. p. 21-27.) Yet, as below argued, the Board's Order was both arbitrary and capricious, ignoring uncontroverted, determinative facts, and overruling *sub silentio* established Board and Court case law. The NLRB thereby disenfranchised the Palo Verde employees of their §§7 and 9 rights by administrative fiat, through patently erroneous reasoning, which substitutes "appropriate unit" criteria for applicable statutorily requisite "self-determination election" criteria. APS' Petition for Rehearing was denied without further comment and its suggestion for rehearing *en banc* was rejected by the Ninth Circuit panel on or about July 15, 1983. (APP. p. 72-73).

ARGUMENT

(a) *Applicable Legal Standard*

Until this case, it was established NLRB law (affirmed by the courts) that accretion of one group of employees into an already existing bargaining unit without a self-determination election was appropriate *only when the new employees have no separate group identity. NLRB v. Food Employers Council, Inc.*, 399 F.2d 501, 502-03 (9th Cir. 1968); *NLRB v. Security-Columbian Banknote Co.*, 541 F.2d 135 (3rd Cir. 1976); *Duke Univeristy*, 227 NLRB 1627 (1977). Thus, if a group of employees possessed *any* separate group identity, accretion was considered inappropriate. Importantly, it was also well established that close questions of separate identity were to be resolved through the election process, and not by application of the accretion doctrine, which denies employees their

freedom of choice. *Westinghouse Electric Corp. v. NLRB*, 440 F.2d 7 (2nd Cir. 1971); *International Union, etc. v. NLRB*, 231 F.2d 237, 243 (7th Cir. 1956), *cert. denied*, 352 U.S. 908, 77 S.Ct. 146, L.Ed.2d 117.

Thus, in *Food Employers Council, Inc., supra*, the Ninth Circuit held:

> In situations in which complex and difficult factual determinations are necessary, however, it would seem advisable—and not unduly burdensome—for unions such as the respondent here to resolve close questions concerning the extension of bargaining agreements in favor of proselytizing the employees in question rather than seeking to represent them through the *fait accompli* of accretion. We frown upon the "successful coup" technique . . . *Food Employers Council, Inc.*, footnote 1.

The courts have consistently reaffirmed that principle. See, for example, the cases cited in *International Woodworkers of America v. Ketchikan Pulp Co.*, 611 F.2d 1295, 103 LRRM 2494, (9th Cir. 1980); and *Sheraton-Kauai Corporation v. NLRB*, 429 F.2d 1352 (9th Cir. 1970). These often articulated standards are intended to protect employees from the type of disenfrancisement that occurred here.

In this area, the courts have also emphasized that reliance upon "administrative discretion," raised in response to an appeal from an accretion ruling, is subject to strict scrutiny. *NLRB v. Security-Columbian Bank Note Co., supra.* at 140; *Sheraton-Kauai Corp. v. NLRB; supra; Phillips Electronics and Pharmaceuticals Industries Corp., Pix Manufacturing Co. Div.*, 181 NLRB 88, 90 (1970); *Melbet Jewelry Co., Inc.*, 180 NLRB 107, 110 (1969). *NLRB v. HMO International*, 678 F.2d 806, LRRM 2745 (9th Cir. 1982).

(b) *NLRB Precedent Establishes the Appropriateness of the Self-Determination Election.*

The NLRB has held repeatedly that employees who possess separate group identity are entitled under §§7 and 9 of the Act to decide, through a secret ballot self-determination election, whether they wish to join an existing bargaining unit or to remain unrepresented, even though the distinct group might not itself constitute an appropriate separate unit.

The NLRB decision in *Duke University*, *supra*, illustrates the Agency's precedent in this area. There, the union filed a petition to represent all maintenance employees at the employer's medical center. The NLRB concluded that while the employees covered by the petition did not constitute a separate appropriate unit, they were entitled to a self-determination election:

> Therefore, we find that the maintenance personnel at the employer's medical center should be given the opportunity by a self-determination election to express their desires with respect to being included in the existing maintenance unit represented by the petitioner and we shall direct an election . . . .

The NLRB has directed self-determination elections under similar circumstances in many other cases. *See*, for example, *Mount Sinai Hospital*, 233 NLRB 507 (1977). *Comax Telcom Corporation*, 219 NLRB 688 (1975); *Kroger Co.*, 201 NLRB 920 (1973); *Metropolitan Hospital*, 223 NLRB 282 (1976). *Importantly, the Board has so directed in cases involving employees employed by public utility companies such as APS. Pacific Northwest Bell*, 253 NLRB 795 (1980); *Utah Power and Light Company*, 258 NLRB 1059 (1981); *Connecticut Light and Power Co.*, 121 NLRB 768 (1958).

That the Palo Verde employees are entitled to an election is further supported by NLRB case law establishing that even where a new group of employees has employment interests connected with an existing bargaining unit, but is engaged in a new and different method of performing functions previously performed by the employees in the bargaining unit, the new group is not an accretion to the existing unit, but may be added to such unit only if the new employees so decide in a self-determination election. *Phototype Inc.*, 145 NLRB 1268; *Sperry Rand Corp., Remington Rand Div.*, 190 NLRB 488 (1971).

The factors deemed important by the NLRB in those cases, such as new skills, separate supervision, little or no interchange, and separate lines of progression between represented and unrepresented groups, *are all present in the instant case*. In this connection, although the Ninth Circuit panel did not attempt to distinguish or even discuss this clearly relevant and dispositive precedent, the Florida District Court of Appeal, Second District, recently did so in *School Board v. Public Employee Relations Co.*, 399 So.2d 520 (Fla. App. D2), 112 LRRM 3443 (1981). There, in refusing to accrete a fringe group of bus garage employees into an existing unit without permitting those employees to vote on the issue of inclusion, the court followed the NLRB precedent discussed above, holding that *"In such cases, the NLRB has never failed to permit a self-determination election among the members of the fringe group before adding them to the existing unit."* [Emphasis added.]

It is clear that the Ninth Circuit panel improperly condoned the Union's "successful coup" by affirming the NLRB ruling accreting hundreds of APS Palo Verde employees into Local 387's bargaining unit, without affording these employees a self-determination election.

(c) *APS' Position is Consistent with the Parties' Bargaining History*

In part, the Ninth Circuit based its ruling on the collective bargaining history of the parties, which the NLRB determined was on a "systemwide basis." However, the NLRB arrived at this conclusion through "bootstrap" logic, expressly ignoring the circumstances that gave rise to the so called "systemwide bargaining." Thus, the record establishes that APS has in the past acquired numerous existing or newly constructed plants and that, as emphasized above, the employees at those newly acquired or constructed plants were incorporated into Local 387's bargaining unit *not* by accretion, but rather *after the Union achieved and proved majority status* among those employees, either through prior representation, NLRB certification after an NLRB conducted election, or merger with predecessor labor organizations. It was *only* on that basis that APS recognized the Union as the collective bargaining representative of the newly acquired or constructed plant's employees. (R.461, L.9 - R.467, L.18.)

This is in notable contrast to the Union's efforts in the instant matter, where the Union specifically admits that it does not represent and has never represented a majority of the Palo Verde employees. (R.353, L.21 - R.354, L. 14; E. Exh. 2(b); R. 368, L. 7-10; R. 354, L. 17 - R. 355, L. 9; R. 496, L. 12-14.)

(d) *The Palo Verde Employees do not Lack Separate Group Identity*

The record is clear that the Palo Verde employees possess sufficient group identity to entitle them to a self-determination election, pursuant to Section 9 of the Act. Simply stated, this large group of employees should be allowed to decide, through a secret ballot election conducted by the NLRB, whether they wish either to be added to Local 387's unit or to remain unrepresentated.

The Palo Verde employees' separate group identity is vividly demonstrated by the differences between the employees in issue and the APS employees included in the existing bargaining unit; differences in skills, duties, and actual terms of employment.

Thus, the record in this case discloses numerous and rather drastic differences in technological requirements for employment at a nuclear power plant, such as Palo Verde, in contrast to the employment requirements in the rest of the APS plants, all of which are fossil fuel or hydroelectric facilities. For example, while special and extensive training and experience in the nuclear industry and the principles of radioactivity are required in order to be employed at a nuclear power plant such as Palo Verde, such training and experience are *not* requirements for employment at any other APS facility. The Palo Verde employees must have extensive training in nuclear power processes, such as boration and dilution, which are peculiar to the nuclear industry and which the employees in Local 387's bargaining unit do not have, since there are no nuclear power generating plants, other than Palo Verde, in the APS system.

Similarly, the Palo Verde employees must also meet stringent qualifications and standards required by the Nuclear Regulatory Commission which simply do not have the remotest application to the unit employees. The magnitude of this regulatory scheme, which again affects only Palo Verde, cannot be overemphasized. In addition, the Palo Verde employees must participate in *extensive* radiation protection programs and are responsible for operation of the water reclamation facility, both unique to Palo Verde. (R.563, L.15; R.567, L.7; E.Exh. 10(b), 10(c), 11, 12; R.102, L.5-R.111, L.13; R.78, L.19-22; R.90, L.19-24; R.96, L.3-97 L.20.)

The record also establishes differences between the

terms and conditions of employment of the Palo Verde employees and Local 387's unit employees. Thus, the Palo Verde employees have virtually no contact or interchange with unit employees and are subject to different progression and bidding procedures. Indeed, the record shows that the only contact between Palo Verde employees and other APS employees is with the power transmission dispatchers employed by APS in Phoenix. Power transmission dispatchers *are not* included in Local 387's unit. *Arizona Public Service Company v. NLRB*, 453 F.2d 228, 231-233 (9th Cir. 1971).

While promotions at Palo Verde are based solely on qualifications, the collective bargaining agreement covering the bargaining unit employees requires that promotions within Local 387's bargaining unit be based substantially upon seniority. Palo Verde employees have a savings plan; bargaining unit employees do not. Palo Verde employees enjoy different sick leave benefits, overtime policies, and grievance procedures from those of the bargaining unit employees. A totally different wage structure is in effect at Palo Verde, because of the inapplicability of many of the job classifications contained in the collective bargaining agreement covering the bargaining unit. Additionally, unlike bargaining unit employees, Palo Verde employees are provided with free transportation to the facility, and with free tools (E. Exh. 8; Jt. Exh. 1(a) (Article IV, §6); R.328, L.16 - R.329, L.10; R.260, L.9 - R.261, L.4; R.281, L.12 - 23; E. Exh. 14; Jt. Exh. 1(a) (Article V); R.120, L.10 - R.121, L.12; R.22, L.18 - R.23, L.3; R.386, L.12 - R.388, L.7; R.390, L.10 - R.391, L.2; R.428, L.10 - R.430, L.7; R.123, L.17 - R.124, L.23; R.384, L.17 - 19; R.398, L.2 - 13.)

Also, it is important to note that the physical remoteness of Palo Verde, which has the overall appearance of a moon station, establishes the separate

identity of the employees that work there. While APS has other plants within the bargaining unit that are also in relatively remote places, as discussed above, the Union did not come to represent the employees at those plants through the *fait accompli* of accretion, and, therefore, those employees' separate identity never became an issue.

In sum, given the different chemical and physical properties of uranium as compared to fossil fuels, the Palo Verde employees are involved in critical processes totally unique to nuclear plants. Palo Verde employees are responsible for a degree of technological and scientific knowledge and skills which is not to be found among the employees in fossil fuel facilities, and enjoy different terms and conditions of employment from those of the Local 387 unit employees. They work in a remote, unpopulated desert location many miles from bargaining unit employees and have no contact or interchange whatsoever with said employees. (R.371 L.23 - R.374, L.19; R.488, L.14 - R.489, L.3.) Moreover, NLRB and the Ninth Circuit's own precedent establish that the small number of unit employees presently transferred to Palo Verde from unit positions, relative to the number of Palo Verde employees, is a strong factor supporting APS's position that the Palo Verde employees possess separate group identity. *Spring City Knitting Company v. NLRB*, 107 LRRM 3125 (1981).

The record evidence unequivocally establishes that the Palo Verde employees have separate group identity.[4]

[4]In this regard, it is important that while the Ninth Circuit noted that the NLRB finding of centralized control of management supported its accretion determination, this finding is contrary to uncontroverted record evidence establishing that the Palo Verde plant manager and supervisors possess ultimate autonomy and authority regarding labor relations at Palo Verde, responsibilities that are obviously critical in the context of an operating nuclear power facility. (R. 274, L. 18 - R. 275, L. 9; R. 129, L. 14-21.) This fact is recognized at footnote 8, page 9 of the Board Decision in the representation case, where the Board stated, "The apparent local autonomy of Palo Verde management is a factor that favors non-accretion." This, combined with the extremely low level of interchange or transfer between the bargaining unit and the Palo Verde employees, along with the different employment terms discussed above, unequivocally establish that the Palo Verde employees do not lack separate group identity.

(e) *The NLRB Erroneously Relied upon Criteria for Unit Determinations as the Basis for Denying the Employees' Rights to a Self-Determination Election.*

Rather than focusing on this unequivocal separate group identity, establishing that the Palo Verde employees have the right to choose to join or refrain from joining an existing and appropriate systemwide unit, the NLRB reasoned only that the Palo Verde employees might appropriately become a part of the existing systemwide unit. This reasoning is correct, insofar as it goes, but it does not address the true issue, which is whether an identifiable fringe group of employees must be given the elective right to choose to join or refrain from joining an existing systemwide unit. By not overtly considering this true issue, the NLRB, *sub silentio* did decide it covertly, against the employees and their right to choose. The Ninth Circuit, in sustaining the Board, failed to perceive or correct the Board's incomplete and erroneous analysis, with its disastrous consequence of disenfranchisement of the Palo Verde employees.

By simply relying on the existence of systemwide bargaining as a basis for accretion, the NLRB confused criteria for systemwide unit determinations with the right to self-determination in the selection of a bargaining representative.

In this regard, both the NLRB and Union relied heavily upon the proposition that systemwide collective bargaining units in the public utility industry are desirable in order to promote uninterrupted maintenance of an essential service. *Baltimore Gas & Electric Co.*, 206 NLRB 199 (1973).

The NLRB also relied upon the *Baltimore Gas* policy of favoring systemwide units as justification for its

underlying decision in the representation proceeding. (NLRB Brief, p. 9-10.) The Ninth Circuit did not mention *Baltimore Gas* in its Memorandum Decision.

It is important to note, however, that consistent with *Baltimore Gas*, APS has *never* claimed that the Palo Verde employees constitute an appropriate separate collective bargaining unit. APS has never sought a departure from the *Baltimore Gas* doctrine. It has always been APS' position in accordance with the NLRB's own precedent cited above, that while the Palo Verde employees do not constitute a separate appropriate collective bargaining unit within the meaning of the Act, they comprise an identifiable separate group. As such, they should not be accreted into an overall collective bargaining unit, without regard for their desires. They should be added, if at all, only through the self- determination election process, which APS submits the law requires.

APS has repeatedly expressed its willingness to recognize the Union as the Palo Verde employees' collective bargaining representative when and if a majority of those employees designate the Union as their collective bargaining representative, either through union designation cards (which the Union has to date been unable to obtain from the Palo Verde employees) or through an NLRB supervised secret ballot election. Until that time, APS submits that recognition of the Union as the exclusive representative of its Palo Verde employees is inconsistent with the very purposes of the Act and with this well-established past bargaining history. Such recognition would create a most unfair and unwarranted result—the imposition of an exclusive collective bargaining representative upon a very large group of employees without affording those employees their statutorily guaranteed freedom of choice.

CONCLUSION

This Court should grant the instant Petition for Writ of Certiorari, and resolve the appropriate standard to be applied in cases where a labor organization seeks to be designated through accretion as the exclusive bargaining representative of a large, unrepresented, separately identifiable group of employees, thereby denying those employees the right to decide if they wish to be so represented.

The NLRB and the Ninth Circuit disregarded the extensive agency and judicial precedent establishing that employees are to be denied a self-determination election, only if they possess *no* separate group identity. This high standard, the vitality of which is clearly at issue in this case, is designed to protect the employees' Sections 7 and 9 rights to select an exclusive bargaining representative or to refrain from selecting one. This is a question with far reaching ramifications which has not been but should be settled by this Court.

RESPECTFULLY SUBMITTED this 13th day of October, 1983.

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APPENDIX

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FILED
JAN 10 1983
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARIZONA PUBLIC SERVICE COMPANY,	)	
Petitioner-Cross-Respondent,	)	NOS. 81-7841 82-7039
v.	)	
NATIONAL LABOR RELATIONS BOARD,	)	MEMORANDUM
Respondent-Cross-Petitioner,	)	
and	)	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 387,	)	
Inventor.	)	

Petition for Review and Cross-Application for Enforcement of an Order of The National Labor Relations Board

Argued and submitted July 9, 1982

Before: ALARCON, POOLE, and NELSON, Circuit Judges

The National Labor Relations Board [NLRB] issued a decision and order on June 5, 1981, finding, inter alia, that certain production and maintenance workers at the Palo Verde nuclear plant constituted an accretion[1/] to the International Brotherhood of Electrical Workers [Union], the existing collective bargaining unit. Arizona Public Service Co., [APS], the public utility that employs the Palo Verde

[1]

production and maintenance workers, refused to recognize and to bargain collectively with the Union as the exclusive bargaining representative of the workers. The NLRB found that APS was engaged in unfair labor practices by its refusal to

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1/ An accretion occurs when new employees are added to an existing collective bargaining unit. NLRB v. Sunset House & Local 399, 415 F.2d 545, 547 (9th Cir. 1969).

bargain collectively with the Union. APS has petitioned this court for review.

The dispositive issue in the matter sub judice is whether the NLRB properly found that the Palo Verde production and maintenance workers were an accretion to the Union. APS contends that the accretion determination was improper because of substantial differences in the terms and conditions of employment of the Palo Verde production and maintenance workers and those of the employees representated by the existing bargaining unit. Furthermore, APS argues that the evidence in the record also establishes that the Palo Verde production and maintenance workers possess a separate group identity and thus accretion is inappropriate. We disagree.

The question as to whether a group of employees represents an accretion to an existing bargaining unit is similar to

the issue of the appropriateness of the determination of a bargaining unit. NLRB v. Sunset House & Local 399, 415 F.2d 545, 547 (9th Cir. 1969). Such a determination is within the particular expertise of the NLRB; and it will not be disturbed absent an abuse of discretion. NLRB v. HMO Internation/California Medical Group Health

[2]

Plan, Inc., 678 F. 2d 806, 809 (9th Cir. 1982); Rayner v. NLRB, 665 F.2d 970, 975 (9th Cir. 1982); Spring City Knitting Co. v. NLRB, 647 F.2d 1011, 1013 (9th Cir. 1981).

Relevant factors to be weighed in making the determination of whether a new group of employees should be considered an accretion include "functional integration of the business, centralized control of management, similarity of working conditions, collective bargaining history,

local power to hire and fire, lack of employee interchange, [and] geographical distance." Sunset House & Local 399, 415 F.2d at 548.

The critical determinant, however, is whether the employees share a substantially identical community of interests with the existing bargaining unit. See Pacific Southwest Airlines v. NLRB, 587 F.2d 1032, 1038, 1041 n. 16 (9th Cir. 1978).

In the matter before us, the NLRB found that there was a functional integration of the business in light of the fact that the electrical power generated by the nuclear plant would feed into the same control system into which the other generating plants' power flows. The combined power is to be disbursed throughout the area that is serviced by APS.

Centralized control of management was also a factor reviewed by the NLRB.

This was illustrated by the fact that each plant manager reports to the vice president of electrical operations in Phoenix, Arizona.

[3]

There was also evidence, based on the collective bargaining history of the parties, that a systemwide unit has been favored.

Finally, the NLRB found that the Palo Verde production and maintenance workers share a community of interest with the bargaining unit employees based on the following facts: (1) labor relations policies for unrepresented employees are centrally determined and uniformly applied throughout the system; (2) the Palo Verde production and maintenance employees occupy many of the same classifications and perform the same functions as bargaining unit employees; (3) a number of former bargaining unit

employees now work as Palo Verde production and maintenance employees; (4) the record indicates that the Palo Verde employees enjoy many of the same terms and conditions of employment as the bargaining unit employees.

Based on the foregoing facts, we find that the NLRB's legal conclusion that accretion of the Palo Verde production and maintenance work is appropriate, is not clearly arbitrary and capricious. See Pacific Southwest Airlines, 587 F.2d at 1037. The NLRB did not abuse its discretion.

Since we find that the accretion determination was proper, we must also uphold the denial of APS' election petition. See, eg., International Union v. NLRB, 231 F.2d 237, 243 (7th Cir.), cert. denied, 352 U.S. 908 (1956).

The NLRB's order is enforced.

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256 NLRB No. 65

FJZ
D--7763

Palo Verde, AZ

UNITED STATE OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ARIZONA PUBLIC SERVICE COMPANY,	)	
Employer-Petitioner,	)	Case 28--RM--394
and	)	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL 387,	)	
Union,	)	
ARIZONA PUBLIC SERVICE COMPANY,	)	Case 28--UC--111
and	)	
Employer	)	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 387,	)	
Petitioner.	)	

DECISION AND ORDER

Upon petitions duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Bruce R. Kettler. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Proceedure, Series 8, as

[1]

amended, the Regional Director for Region 28 transferred this case to the Board for decision. Thereafter, the parties filed briefs.[1/]

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

1/ The Employer's request for oral argument is hereby denied, since the record and the briefs adequately present the position of the parties.

On the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

On December 15, 1980, the Employer filed the instant RM petition requesting an election among the production and maintenance employees employed at its Palo Verde nuclear unit. On the same day, the Union filed the instant UC petition, seeking accretion of the Palo Verde employees into a systemwide production

and maintenance bargaining unit. For the reasons stated below, we find that the group of employees in question are

[2]

an accretion to the bargaining unit currently in existence, and we accordingly dismiss the Employer's petition for an election among these employees.

The Employer is a public utility engaged in the supplying of electric power throughout the State of Arizona. It currently owns and operates several nonnuclear generating units, and is in the process of building (as part owner) at Palo Verde, Arizona, the nuclear power plant involved herein.

The Employer's corporate headquarters are in Phoenix, Arizona. Its nonnuclear plants are located in Arizona and New Mexico. Ralative [sic.] to the other units in the system, Palo Verde (55 miles from Phoenix) is one of the closest to the company's headquarters.

Administration of the Employer's electric power generation production is centralized in the office of vice president of electrical operation whose offices are located in Phoenix. The plant managers at the nonnuclear units report to this official of the company. The power produced by each of the nonnuclear units is mingled with the power transmitted by the other units and thereafter dispatched throughout the State of Arizona.

The Palo Verde plant manager, like his equals at the other generating units, reports to the vice president of electrical operations. The Palo Verde plant will not service a distinct geographical area once it commences operation. Rather, the electrical power generated by the nuclear unit will feed into the same control system as the power transmitted by the nonnuclear

units and will be dispatched in the same manner as the nonnuclear generated power.

The Employer's labor relations policies appear to be carefully determined and administered. All production and maintenance employees employed at the nonnuclear power generating plants are represented by the Union in a single systemwide bargaining unit. Since at least 1947, the Employer and the Union have had a bargaining relationship, during which time the Employer has by acquisition or construction added several generating units to its system. The practice of the parties in these cases has been to incorporate the production and maintenance employees at the newly acquired or constructed facilities into

the contractual systemwise bargaining unit.[2/]

The Employer's unrepresented employees are classified "performance review" employees. The performance review employees throughout the system are subject to salary guidelines and performance review policies established by central management. The rules described in the company handbook of rules for performance review employees are applied uniformly throughout the system. Transfers and job bidding for posted performance review vacancies are available to all performance review employees on the same basis.

Many benefits provided by the company are common to both represented and unrepresented employees. Thus, the performance review employees, as well as

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2/ The current contract, dated April 1, 1980, expires on April 1, 1982.

bargaining unit employees, enjoy

[4]

the same vacation policy, holidays, pension, and dental and medical benefits.

The day-to-day supervision of Palo Verde production and maintenance employees appears to be vested in plant management. The Palo Verde plant manager retains significant authority in the implementation of the Company's uniform policies and in the direction of employees.

The Employer began hiring employees for the Palo Verde nuclear unit in 1977, for use in the production and maintenance areas.[3/] The nuclear unit presently employs approximately 62 production and maintenance employees, 12 or 13 of whom

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3/ The parties stipulated and we find that, although the number or employees will continue to expand, the present complement is representive.

transferred from other units within the Employer's operations. These employees are now classified as performance review employees and are accorded benefits as described above.

Largely due to regulations imposed by the Nuclear Regulatory Commission, some special training is required for the Palo Verde employees. Nonetheless, the record evidences that many of the production and maintenance classifications at Palo Verde are common to all the Employer's plants, and further that the functions of the Palo Verde employees are comparable to those performed by their counterparts elsewhere in the Employer's system. And, as noted above, approximately 20 percent of the production and maintenance employees at Palo Verde transferred there from bargaining unit positions.

The Employer urges that Board precedent requires a systemwide unit as the only appropriate unit for its employees, but that substantial differences in skills, functions, and technological knowledge between the Palo Verde employees and bargaining unit employees and the local autonomy of the Palo Verde management compel refusal of the Union's contention that the Palo Verde employees constitute an accretion to the existing systemwide bargaining unit. Therefore, argues the Employer, the Palo Verde employees must be allowed the opportunity to decide for themselves whether to be incorporated into the bargaining unit or to remain unrepresented.

The Union opposes the Employer's petition, urging instead that the Palo Verde employees are merely an accretion to the existing production and maintenance

unit. Should the Board decline to apply the accretion doctrine, the Union contends that no question concerning representation exists because the Union has made no claim to represent a majority of the employees in question, and that therefore the Employer's petition should be dismissed. In the alternative, the Union argues that, if the Board determines an election is appropriate, the employees be given a choice between representation in a separate unit or the existing system-wide unit.[4/]

CONCLUSION

We are persuaded by a number of factors, including the integrated nature of the Employer's operations, the community of

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4/ In the event the Board directs an election, the Union also argues that certain technical employees should be included on the voting unit.

interest that the employees in question share in common with their counterparts elsewhere in the Employer's system, and the bargaining history between the parties, that the Palo Verde employees are an accretion to the systemwide production and maintenance bargaining unit.

We have long held that in the public utility industry, operation of which is characterized by a high degree of integration, the optimum unit is a systemwide one. Baltimore Gas & Electric Co., 206 NLRB 199, 201 (1973). We deviate from this policy where the boundaries of the requested unit conform to a well-defined administrative segment of the utility's operation, where the requested unit services a distinct geographical area, and where a separate unit can be established without involving disturbance of the employer's ability to perform its necessary

function. United Gas, Inc., 190 NLRB 618, 618--619 (1971); Monongahela Power Company, 176 NLRB 915, 917 (1969).

Here, the electric power that will be generated by the nuclear plant will feed into the same control system into which the other generating units' power flows and will be disbursed throughout the area which the Employer services. This integration of operations is reflected in the Employer's centralized administration of operations---illustrated by the fact that each plant manager reports to the vice president of electrical operations whose offices are located in Phoenix. Thus, the

[7]

requested unit does not represent a unique administrative segment of the Employer's operations, nor will the Palo

Verde generating plant service a distinct geographical area.[5/]

Further, we believe that the Palo Verde employees share a community of interest with bargaining unit employees. It is clear that the labor relations policies for unrepresented employees are centrally determined and uniformly applied throughout the system. It is also clear that the Palo Verde production and maintenance employees, although presently classified performance review employees, occupy many of the same classifications and perform the same functions as bargaining unit employees. In addition, we

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5/ Although the record suggests that, because of computerization, the Employer's ability to perform its functions would not necessarily be curtailed by a cessation of work at Palo Verde, we find that this factor does not outweigh the above-recited factors indicating a high degree of centralization in the Employer's operations and administration.

note that a not insignificant number of former bargaining unit employees now work in production and maintenance positions at Palo Verde. Finally, the record indicates that the Palo Verde employees enjoy many of the same terms and conditions of employment accorded bargaining unit employees. Accordingly, based on the Employer's centralized labor relations policies, the similarity of classifications, functions, and terms and conditions of employment of Palo Verde employees and bargaining unit employees, and the transfers from unit positions to Palo Verde production and maintenance positions, we find that the Palo Verde employees share a community of interest with the Employer's represented production and maintenance employees.

[8]

We also find significant that bargaining between the parties has historically been on a systemwide basis. The Employer in the past has extended recognition to the Union as representative of employees at facilities added to the utility system.[6/] We are reluctant to grant a less than systemwide unit where to do so would be contrary to extensive bargaining history on a systemwide basis. Baltimore Gas, supra at 201.

Therefore, based on the above factors, we find that the Palo Verde production and maintenance employees are

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6/ Since we utilize this fact merely as evidence that the parties have historically favored systemwide bargaining, we do not believe its relevance is nullified because the parties disagree as to the exact circumstances surrounding the Employer's extension of recognition.

accretions to,[7] and should be included in,[8] the systemwide production and maintenance unit represented by the Union.

In view of the foregoing, we find that no question concerning representation of the Palo Verde production and maintenance employees exists, and we shall dismiss the petition in Case 28--RM--394.[9]

[9]

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[7] It is well established that employees accreted to an existing unit are not accorded a self-determination election. The Goodyear Tire & Rubber Company (Apple Grove, West Virginia Plant), 147 NLRB 1233, 1234, fn. 6 (1974), and case cited therein.

[8] The apparent local autonomy of Palo Verde management is a factor that favors nonaccretion. However, in considering an accretion issue, we examine a number of factors. We find in this case that local autonomy alone is insufficient to overcome the many factors supporting a systemwide unit.

[9] Because of our disposition of this case, we need not address the other contentions urged by the parties.

ORDER

It is hereby ordered that the petition in Case 28--RM--394 be, and it hereby is, dismissed in its entirety.

IT IS FURTHER ORDERED that the existing systemwide bargaining unit for the Employer's production and maintenance employees, currently represented by International Brotherhood of Electrical Workers, Local 387, AFL-CIO, be, and it hereby is, clarified to include those production and maintenance employees located at the Employer's Palo Verde, Arizona, facility.

DATED, Washington, D.C., June 5, 1981.

NATIONAL LABOR
RELATIONS BOARD

John H. Fanning,
Chairman

Howard Jenkins, Jr.,
Member

Don A. Zimmerman,
Member

[SEAL]

[10]

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259 NLRB No. 72

D--8351
Palo Verde, AZ

UNITED STATE OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ARIZONA PUBLIC SERVICE COMPANY

and

Case 28-CA-6600

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
AFL-CIO, LOCAL 387

DECISION AND ORDER

Upon a charge filed on August 17, 1981, by International Brotherhood of Electrical Workers, AFL--CIO, Local 387, herein called the Union, and duly served on Arizona Public Service Company, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 28, issued a complaint on September 1, 1981, against Respondent, alleging that Respon-

dent had engaged in and was engaging in unfair labor practicos affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that, since June 25, 1981, following a Board

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Decision and Order,[1/] and at all times thereafter, Respondent has refused, and continues to date to refuse, to recognize and to bargain collectively with the Union as the exclusiue bargaining representative of Respondent's Palo Verde, Arizona, nuclear power plant production

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1/ 257 NLRB No. 65 (1981).

and maintenance employees in the appropriate unit,[2/] although the Union has requested and is requesting it to do so. On September 14, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On September 22, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on September 30, 1981, the Board issued an order transferring the

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[2/] Official notice is taken of the record in the representation proceeding, Cases 28--RM--394 and 28--UC--111, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See LTV Electrosystems Inc., 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); Golden Age Beverage Co., 167 NLRB 151 (1967); enfd. 415 F.2d 26 (5th Cir. 1969); Intertype Co. v. Penello, 269 F.Supp. 573 (D.C. Va. 1967); Follett Corp., 164 NLRB 378 (1967); enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2]

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent admits that the existing systemwide unit of certain of its production and maintenance employees constitutes a unit appropriate for purposes of collective bargaining within the

meaning of Section 9(b) of the Act, and that the Union is the designated exclusive representative or its production and maintenance employees as set forth in successive collective-bargaining agreements. Respondent, however, stresses that these agreements do not include the Palo Verde production and maintenance employees, and denies that the Palo Verde employees may be part of thc systemwide bargaining unit without first having an opportunity to vote in a self-determination election as to whether they wish to be included in that unit or to remain unrepresented.

In the Motion for Summary Judgment, the General Counsel argues that Respondent's answer attempts to relitigate issues that were raised and determined by the Board in the underlying representation cases. We agree with the General Counsel.

The record, including the record in the underlying representation cases, Cases 28--RM--394 and 28--UC--111, shows that, in December 1980, Respondent filed an RM petition seeking an election among its production and maintenance employees at its Palo Verde nuclear power plant, and that the Union filed a UC petition seeking a clarification of the existing systemwide production and maintenance unit to include the Palo Verde

[3]

employees as an accretion to the systemwide unit. Following transfer of the cases to the Board by the Regional Director, on June 5, 1981, the Board issued a Decision and Order[3/] in which it found that Respondent's Palo Verde production and maintenance employees were an accre-

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3/ 256 NLRB No. 65.

tion to the existing systemwide bargaining unit represented by the Union. The Board found that no question concerning representation of the Palo Verde employees existed, and therefore dismissed the petition in Case 28--RM--394.

On June 15, 1981, Respondent filed with the Board a motion for reconsideration of the Board's Decision and Order. On June 19, 1981, the Board issued an unpublished Order denying Respondent's motion. On July 1, 1981, Respondent filed with the Board a renewed motion for reconsideration of the Board's Decision and Order. On July 9, 1981, the Board issued an unpublished Order denying Respondent's renewed motion.

On June 24 and July 13, 1981, the Union requested Respondent to recognize it as the exclusive representative of the Palo Verde production and maintenance

employees and to bargain collectivoly regarding those employees' rates of pay, wages, hours of employment, and other terms and conditions of employment. Respondent, by letters dated June 25 and July 20, 1981, refused to recognize and to bargain with the Union, and has continued to refuse to recognize and to bargain with the Union as the exclusive bargaining representative of its Palo Verde employees. Respondent asserts as reasons for its continued refusal to recognize and to bargain with the Union that the Board ignored

[4]

facts which make the application of the accretion doctrine inappropriate in this case, that the Palo Verde employees constitute a new and distinct grouping, and that Board law requires that such employees be granted a self-determination

election as to whether they wish to be represented by the Union or remain unrepresented--arguments previously presented to and considered by the Board. Thus, it appears that Respondent is attempting to raise in this proceeding issues which were raised and determined in the underlying representation cases.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4/]

All issues raised by Respondent in this proceeding were or could have been

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4/ See Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Sections 102.67(f) and 102.69(c).

litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

[5]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. The Business of Respondent

Respondent, an Arizona corporation, is engaged as a public utility in the generation, transmission, distribution,

and sale of electricity and natural gas. During the past 12-month period, which period is representative of its operations generally, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $250,000, and during the same period of time purchased goods and materials valued in excess of $50,000 which were transported in interstate commerce and delivered to its operations in the State of Arizona directly from suppliers located in States of the United States other than the State of Arizona.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

IT IS FURTHER ORDERED that the existing systemwi

II. The Labor Organization Involved

International Brotherhood of Electrical Workers, AFL--CIO, Local 387, is a labor organization within the meaning of Section 2(5) of the Act.

[6]

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed by Respondent throughout Respondent's system-wide operations.

2. The recognition

At all times material herein, the Union has been the designated exclusive collective-bargaining representative of Respondent's employees in the unit described above, and has been recognized as

such by Respondent. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms from April 1, 1980, to April 1, 1982.

3. The Board's Decision and Order

On June 5, 1981, the Board issued a Decision and Order,[5/] finding, inter alia, that certain production and maintenance employees employed by Respondent at its Palo Verde, Arizona, nuclear power plant, which is currently in the process of being constructed, are an accretion to, and included in, the unit described above.

B. The Request to Bargain and Respondent's Refusal

Commencing on or about June 24, 1981, and at all times thereafter, the

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5/ 256 NLRB No. 65.

Union has requested Respondent to bargain

[7]

collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about June 25, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since June 25, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the

[8]

appropriate unit and, if an understanding

is reached, embody such understanding in a signed agreement.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Arizona Public Service Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers, AFL--CIO, Local 387, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance emoloyees employed by Respondent throughout Respondent's systemwide operations constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the above-named labor organization has been and now is the designated exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about June 25, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering

with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Arizona Public Service Company, Palo Verde, Arizona, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Brotherhood of Electrical Workers, AFL--CIO, Local 387, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees employed by Respondent throughout Respondent's systemwide operations.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the

exclusive representative of all employees in

[10]

the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Palo Verde, Arizona, facility copies of the attached notice marked "Appendix."[6/] Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's repre-

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6/ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

sentative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

DATED, Washington, D.C., December 3, 1981.

NATIONAL LABOR
RELATIONS BOARD

John H. Fanning,
Member

Howard Jenkins, Jr.,
Member

Don A. Zimmerman,
Member
NATIONAL LABOR RE-
LATIONS BOARD

(SEAL)

[12]

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Brotherhood of Electrical Workers, AFL--CIO, Local 387, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with

respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees employed by us throughout our systemwide operations.

ARIZONA PUBLIC
SERVICE COMPANY

_____
(Employer)

Dated _____

By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced,

or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Second Floor, 3030 North Central Avenue, P. O. Box 33069, Phoenix, Arizona 85012, Telephone 602--241--2362.

RECEIVED
JUL 18 1983
SNELL & WILMER

FILED
JUL 15 1983
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATE COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARIZONA PUBLIC SERVICE COMPANY, Petitioner-Cross-Respondent, v. NATIONAL LABOR RELATIONS BOARD, Respondent-Cross-Petitioner, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 387, Intervenor.	NOS. 81-7841 81-7039 O R D E R

Before: ALARCON, POOLE, and NELSON, Circuit Judges

The panel as constituted in the above case has voted to deny the petition

for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no active judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

PMP/22-F

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has rea-

sonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the

not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.*

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit votes against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in

*Pursuant to Public Law 93-360, 93d Cong., S. 3203, 88 Stat. 396, Sec. 8 is amended by adding subsec. (g).

a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the person filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent elec-

tion in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e)(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have

national in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Until the record in the case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and

shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the court shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and

FORM NLRB-4279
10-551
FORMERLY NLRB-765,
765a and 765b

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

RC-

In the Matter of

ARIZONA PUBLIC SERVICE COMPANY

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 387, AFL-CIO

Type of Election

- [X] CONSENT AGREEMENT
- [ ] BOARD ORDERED
- [ ] STIPULATION

Case No. 21-RC-4242

CERTIFICATION OF REPRESENTATIVES

An election having been conducted in the above matter by the undersigned Regional Director of the National Labor Relations Board in accordance with the Rule and Regulations of the Board; and it appearing from the Tally of Ballots that a collective bargaining representative has been selected; and no objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefor;

Pursuant to authority vested in the undersigned by the National Labor Relation Board,

IT IS HEREBY CERTIFIED that

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 387, AFL-CIO

has been designated and selected by a majority of the employees of the above-named Employer, in the unit herein involved, as their representative for the purposes of collective bargaining, and that, pursuant to Section 9 (a) of the Act as amended, the said organization is the exclusive representative of all the employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Signed at Los Angeles, California
On the 25th day of January , 196,

On behalf of

NATIONAL LABOR RELATIONS BOARD

Acting Regional Director for 21st Region
National Labor Relations Board

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

	TYPE OF ELECTION (Check one)	(Also check box below where appropriate)
ARIZONA PUBLIC SERVICE Employer and LOCAL UNION #387, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS Petitioner	☐ Consent Agreement ☒ Stipulation ☐ Board Direction ☐ RD Direction	☐ 8(b)(7)

Case No. 28-RC-2127

CERTIFICATION OF REPRESENTATIVE

An election having been conducted in the above matter under the supervision of the Regional Director of the National Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that a collective bargaining representative has been selected; and no objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefor;

Pursuant to authority vested in the undersigned by the National Labor Relations Board, IT IS HEREBY CERTIFIED that

LOCAL UNION #387, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

has been designated and selected by a majority of the employees of the above-named Employer, in the unit described below, as their representative for the purposes of collective bargaining, and that, pursuant to Section 9 (a) of the Act as amended, the said organization is the exclusive representative of all the employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

UNIT: All [illegible] and storekeepers employed by Arizona Public Service in Arizona and New Mexico excluding office clericals, guards and supervisors as defined by the Act.

Signed at Albuquerque, New Mexico
On the 22nd day of January, 191.

On behalf of
NATIONAL LABOR RELATIONS BOARD

C. Woodrow Keene
Regional Director, Region 28
National Labor Relations Board

...al Brotherhood of Electrical Workers

LOCAL UNION 387
...N. 7th St. ... Suite 9
Phone 264-1544
PHOENIX, ARIZONA 85014

December 7, 1970

Mr. C. J. Amerman, Manager
Employees Relations
Arizona Public Service Company
P. O. Box 21666
Phoenix, Az 85036

Dear Chuck:

This letter is to advise you that I.B.E.W. Local Union #387 has been authorized by a majority of the Warehouse employees of Arizona Public Service Company, in the states of Arizona and New Mexico, to represent them in collective bargaining. This does not include clerical or supervisory personnel.

Your return letter of confirmation and agreement to establish a date to commence negotiations will be appreciated no later than December 14, 1970.

Sincerely,

Floyd Bowden, Business Manager
I.B.E.W. Local Union #387

CB:md

opeiu #56
afl-cio

RECEIVED
EMPLOYEE
RELATIONS

FORM NLRB-1078
(5-73)

NC-RM-69

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

ARIZONA PUBLIC SERVICE COMPANY

Employer

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL NO. 387, AFL-CIO

Petitioner

TYPE OF ELECTION
(Check one)
- ☐ Consent Agreement
- ☒ Stipulation
- ☐ Board Direction
- ☐ RD Direction

(Also check box below where appropriate)
- ☐ 8(b)(7)

Case No. 28-RC-3221

CERTIFICATION OF REPRESENTATIVE

An election having been conducted in the above matter under the supervision of the Regional Director of the National Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that a collective bargaining representative has been selected; and no objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefor;

Pursuant to authority vested in the undersigned by the National Labor Relations Board, IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
LOCAL NO. 387, AFL-CIO

and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the unit set forth below, found to be appropriate for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

UNIT:

All fuel specialists employed by the Employer at Four Corners Power Plant, Fruitland, New Mexico, and its West Phoenix Power Plant; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.

IT IS HEREBY CERTIFIED that the said organization may bargain for the employees in the above-named category as part of the existing unit.

Signed at Phoenix, Arizona
On the 21st day of October 19 76

On behalf of
NATIONAL LABOR RELATIONS BOARD

William N. Cates

Regional Director, Region 28
National Labor Relations Board

NC-3M-99

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

ARIZONA PUBLIC SERVICE COMPANY

Employer

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL NO. 387, AFL-CIO

Petitioner

TYPE OF ELECTION
(Check one)
☐ Consent Agreement
☒ Stipulation
☐ Board Direction
☐ RD Direction

(Also check box below where appropriate)
☐ 8(b)(7)

Case No. 28-RC-3213

CERTIFICATION OF REPRESENTATIVE

An election having been conducted in the above matter under the supervision of the Regional Director of the National Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that a collective bargaining representative has been selected; and no objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefor;

Pursuant to authority vested in the undersigned by the National Labor Relations Board, IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL NO. 387, AFL-CIO

and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the unit set forth below, found to be appropriate for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

UNIT:

All cathodic protection testers employed by the Employer at its facility at 2121 W. Cheryl Dr., Bldg. F, Phoenix, Arizona; excluding all other employees, office clerical employees, guards, professional employees and supervisors as defined in the Act.

Signed at Phoenix, Arizona
On the 16th day of September 1977

On behalf of
NATIONAL LABOR RELATIONS BOARD

Regional Director, Region 28
National Labor Relations Board

1978
NATIONAL LABOR RELATIONS BOARD

FORM NLRB-4179 (5-79)

RC-RM-RD

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

ARIZONA PUBLIC SERVICE COMPANY

Employer

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL NO. 387, AFL-CIO

Petitioner

TYPE OF ELECTION
(Check one)
- ☒ Consent Agreement
- ☐ Stipulation
- ☐ Board Direction
- ☐ RD Direction

(Also check box below where appropriate)
- ☐ 8(b)(7)

Case No. 28-RC-3587

CERTIFICATION OF REPRESENTATIVE

An election having been conducted in the above matter under the supervision of the Regional Director of the National Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that a collective bargaining representative has been selected; and no objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefor;

Pursuant to authority vested in the undersigned by the National Labor Relations Board, IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL NO. 387, AFL-CIO

and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the unit set forth below, found to be appropriate for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

UNIT: All auto parts specialists employed by the Employer in the States of Arizona and New Mexico; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

Signed at Phoenix, Arizona
On the 23rd day of January 1979

On behalf of
NATIONAL LABOR RELATIONS BOARD

/s/ Linda V. Tamoria

Regional Director, Region 28
National Labor Relations Board

Best Copy Available

FORM NLRB-4279
(3-79)

RC-RM-RD

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

ARIZONA PUBLIC SERVICE COMPANY

Employer

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL NO. 387, AFL-CIO

Petitioner

TYPE OF ELECTION
(Check one)
- [X] Consent Agreement
- [ ] Stipulation
- [ ] Board Direction
- [ ] RD Direction

(Also check box below where appropriate)
- [ ] 8(b)(7)

Case No. 28-RC-3587

CERTIFICATION OF REPRESENTATIVE

An election having been conducted in the above matter under the supervision of the Regional Director of the National Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that a collective bargaining representative has been selected; and no objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefor;

Pursuant to authority vested in the undersigned by the National Labor Relations Board, IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL NO. 387, AFL-CIO

and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the unit set forth below, found to be appropriate for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

UNIT: All auto parts specialists employed by the Employer in the States of Arizona and New Mexico; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

Signed at Phoenix, Arizona
On the 23rd day of January 1979

On behalf of
NATIONAL LABOR RELATIONS BOARD

Regional Director, Region 28
National Labor Relations Board

Best Copy Available

Form NLRB-502 (11-68)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Form Exempt Under 44 U.S.C. 3512

PETITION

DO NOT WRITE IN THIS SPACE

Case No. 28-RC-4201

Date Filed July 1, 1983

INSTRUCTIONS: Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.
If more space is required for any one item, attach additional sheets, numbering each accordingly.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

1. Purpose of this Petition (If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition should not be checked.):

(Check one)

- [X] RC-CERTIFICATION OF REPRESENTATIVE—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- [ ] RM-REPRESENTATION (EMPLOYER PETITION)—One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- [ ] RD-DECERTIFICATION—A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.
- [ ] UD-WITHDRAWAL OF UNION SHOP AUTHORITY—Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- [ ] UC-UNIT CLASSIFICATION—A labor organization or a currently recognized by employer, has petitioned under circumstances of Petitioner seeks clarification of placement of certain employees. (Check one) [ ] No one has previously certified [ ] In case previously certified in Case No. _____.
- [ ] AC-AMENDMENT OF CERTIFICATION—Petitioner seeks amendment of certification issued in Case No. _____.

Attach statement describing the specific amendment sought.

2. Name of Employer	Address where representative to contact	Phone No.
ARIZONA PUBLIC SERVICE COMPANY	Charles Nelson	271-2844

3. Address of establishment involved (Street and number, city, State, and ZIP Code)
P. O. Box 21666, Phoenix, AZ 85036

4a. Type of establishment (Factory, mine, wholesaler, etc.)	4b. Principal product or service
Public utility	Public utility

5. Unit involved (In UC petition, describe PRESENT bargaining unit and attach description of proposed clarification.) | 6a. Number of employees in unit:

Included: All field representatives employed in the credit department

Present 12

Proposed (per UC/AC)

Excluded: All other employees, guards and supervisors.

6b. Is this petition supported by 30% or more of the employees in the unit? [ ] Yes [ ] No

*Not applicable to RD, UC and AC petitions

(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)

7a. [X] Request for recognition as Bargaining Representative was made on Petition constitutes request (Month, day, year) and Employer declined recognition on or about _____ (Month, day, year) or did not reply to request.

7b. [ ] Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8. Recognition or Certified Bargaining Agent (If none, so state)

Name	Affiliation
None	
Address	Date of Recognition or Certification

9. Date of Expiration of Current Contract, if any (Show month, day, and year)

10. If the unit includes less than 30 days, indicate what the date of expiration of subsequent contract is (Month, day, and year)

11a. Is there now a strike or picketing at the Employer's establishment(s) involved? Yes ____ No X

11b. If so, approximately how many employees are participating?

11c. The Employer was picketed on or about the (Month) day of _____ (Year) by or on behalf of _____ (Name of labor organization), a labor organization, which has its principal office at _____ (Street address) in _____ (City) and which has been engaged in picketing the Employer since _____ (Month, day, year).

12. Organizations or individuals other than Petitioner and labor organizations known to claim an interest in the unit described in item 5 above. (If none, so state.)

Name	Affiliation	Address	Date of Claim (Completed only if Petition is filed by Employer)
None			

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

LOCAL 387, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
(Name of Union and Affiliation, if any)

By Harold M. Pinkus — Business Representative
(Signature of representative or person filing petition) (Title or office, if any)

Address 5818 North Seventh Street, Suite 105, Phoenix, AZ 85014 264-1844
(Street and number, city, State, and ZIP Code) (Area code and telephone number)

WILLFULLY FALSE STATEMENT ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Form Approved
Budget Bureau No. 44-R002.11

PETITION

DO NOT WRITE IN THIS SPACE

Case No. 28-RM-394

Date Filed December 15, 1980

INSTRUCTIONS: Answer all applicable items. If you need additional space, use separate paper and identify item number. Sign and file original and four copies of petition with Regional Director for region in which alleged unit exists. If more space is required for any one item, attach additional sheets, numbering each accordingly.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

1. Purpose of this Petition: (If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.)

(Check one)

- ☐ RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- ☒ RM-REPRESENTATION (EMPLOYER PETITION) - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- ☐ RD-DECERTIFICATION - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.
- ☐ UD-WITHDRAWAL OF UNION SHOP AUTHORITY - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- ☐ UC-UNIT CLARIFICATION - A labor organization is currently recognized by employer, but petitioner seeks clarification of placement of certain employees. (Check one) ☐ is not presently certified ☐ is presently certified in Case No. _____
- ☐ AC-AMENDMENT OF CERTIFICATION - Petitioner seeks amendment of certification issued in Case No. _____

(Check appropriate classification and request)

2. Name of Employer: Arizona Public Service Company
   Address(es) of establishment(s) involved (Street and number, city, State, and ZIP Code): Palo Verde Nuclear Generating Station
   Type of Establishment (Factory, mine, wholesaler, etc.): Nuclear Generating Station
   Principal product or service: Electricity

3. Name(s) of Representative or person(s) requesting recognition: Joseph Gelinas
   Phone No.: 271-2451

4. Classification(s) and number of employees in the unit found appropriate: all nuclear operators 1, 2 and 3; instrument control technician senior; electrician water reclamation facility; general maintenance employees; instrument and control repairmen - water reclamation facility; water reclamation facility operators, 1, 2 and 3; storekeepers, employed by employer at Palo Verde Nuclear Generating Station. Excluded: Office clerical employees, professional employees, guards, watchmen, supervisors as defined by the Act, and all other employees.

   a. Number of employees in unit: Present 45; Proposed (If UC/AC)

   b. Is this petition supported by 30% or more of the employees in the unit? ☐ Yes ☐ No

   *Not applicable to RM, UC, and AC petitions

(If you have checked box RC or RM, check and complete EITHER item 5a or 5b, whichever is applicable)

5a. ☒ Request for recognition as Bargaining Representative was made on December 8, 1980 (Month, day, year) and Employer declined recognition on or about December 8, 1980 (Month, day, year) (If no reply received, so state)

5b. ☐ Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

6. Recognition or Certified Bargaining Agent (If none, so state): NONE
   Address: _____ Date of recognition or certification: _____

7. Date of expiration of current agreement, if any (Month, day, and year): NONE
   (If none, so state)

8a. Is there now a strike or picketing at the Employer's premises (Yes or No)? _____

8b. If so, approximately how many employees are participating?

8c. The picketing has been in progress since (Month, day, year)

8d. Organization representing or assisting persons picketing

9. Other organizations or individuals known to have a claim to recognition as representatives of employees in the unit described in item 4 above, or other employers of employees in such unit:

Name	Affiliation	Address	Date of Claim (If request made of Employer, so state)
IBEW Local 387	IBEW	5818 W. 7th Street Phoenix, Az.	12/8/80

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Arizona Public Service Company
(Name of Petitioner)

By: Snell Everhart
(Signature and title of officer)

Attorney
(Title, if any)

Address: 3100 Valley Center, Phoenix, AZ 85073
(Street and number, city, State, and ZIP Code)

257-7362
(Telephone number)

WILLFULLY FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001).

NATIONAL LABOR RELATIONS BOARD
REGION 28
3030 North Central Avenue
P.O. Box 33069
Phoenix, Arizona 85067
Telephone (602) 241-2350

Resident Offices:
Pasco Plaza Building
5000 Marble Avenue NE.
Albuquerque, New Mexico 87110
Telephone (505) 766-2508

Pershing Building, Suite 307
4100 Rio Bravo Street
El Paso, Texas 79902
Telephone (915) 543-7737

July 2, 1981

Mr. Jim Jackson
457 East Eighth Street
Mesa, AZ 85203

Re: Arizona Public Service Company
256 NLRB No. 65

Dear Mr. Jackson:

This will acknowledge your letter dated June 25, 1981.

On June 5, 1981, the National Labor Relations Board in Washington, D. C. issued a Decision and Order in the above-captioned case. I have enclosed a copy of that document for your review.

The Board concluded that based upon a number of factors, including the integrated nature of your Employer's operations, the community of interest that the employees at Palo Verde share in common with their counterparts elsewhere in your employer's electric power production and distribution system, and the bargaining history between your employer and the Union, the Palo Verde employees constituted an addition, technically referred to as an accretion, to the systemwide production and maintenance bargaining unit.

Inasmuch as the Board has decided that the Palo Verde employees constitute an accretion to the existing bargaining unit currently represented by the Union, there is no question affecting commerce which exists concerning the representation of such employees within the meaning of Section 9 of the National Labor Relations Act, as amended. Therefore, no election can be held in this matter at this time. Under these circumstances I have no alternative but to return your petition for an election.

Very truly yours,

Roy H. Garner
Acting Regional Director

Enclosures

June 25, 1981

National Labor Relations Board
Phoenix, Arizona

Dear sir,

This letter is meant to inform you of a situation existing at Palo Verde Nuclear Generating Station, presently being operated by Arizona Public Service Company.

On June 5, 1981, the company was informed that the NLRB had issued an order in favor of Local 387's Unit Clarification Petition. As you know, IBEW Local 387 represents the production and maintenance employees employed by Arizona Public Service. The maintenance employees at Palo Verde wish to make it known that we desire a vote, by secret ballot, to determine our inclusion into this, or any bargaining unit.

The enclosed petition is being submitted as an indication of our sincereity. These signatures represent over 50% of the people effected.

Thanks for your consideration of this matter that is of utmost importance to many of the employees involved.

Sincerly,

Jim Jackson
Maintenance Mechanic

Copies with enclosures:
Mr. Wes Hartley
Mr. G. Carl Andognini
Mr. Keith L. Turley
Mr. Thomas C. Woods Jr.
Mr. Otis Ingram
Mr. Rex Ozment
Mr. Jerry Morales; Attorney
File-Jim Jackson

Best Copy Available

WE THE UNDERSIGNED EMPLOYEES AT PALO VERDE NUCLEAR GENERATING STATION, WITH ARIZONA PUBLIC SERVICE BEING THE PRINCIPLE OPERATOR OF SAID GENERATING STATION, REQUEST THAT NATIONAL LABOR RELATIONS BOARD UPON RECIEPT OF THIS PETITION HOLD AN ELECTION BY SECRET BALLOT. THIS BEING IN REFERENCE AS TO WHETHER OR NOT THE FORESENTIONED EMPLOYEES DESIRE REPRESENTATION BY LOCAL #387 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS OR ANY OTHER SUCH REPRESENTATIVE. THE PETITION BEING FILED IN REFERENCE TO "TEAT OF LABOR MANAGEMENT RELATIONS ACT, 1947", AS AMENDED BY PUBLIC LAWS 86-257, 1959*, AND 93-360, 1974** - (TITLE I - AMENDMENT OF NATIONAL LABOR RELATIONS ACT) - SEC.101, SEC. 9 - PARAGRAPH 5 (a) 1.

Best Copy Available

[illegible] PETITIONED [illegible] IT FILED VERIFIED AUTHORIZATION [illegible] ELECTION, [illegible] AND PUBLIC INTEREST WITHIN THE MEANING OF [illegible] AND [illegible] SECTION, [illegible] SECTION 9 (c)(1)(B) OF THE NATIONAL LABOR RELATIONS ACT. SAID PETITION, A COPY OF WHICH IS ATTACHED HERETO AND MADE A PART HEREOF, ALLEGES THAT QUESTIONS AFFECTING COMMERCE HAVE ARISEN CONCERNING THE REPRESENTATION OF EMPLOYEES OF THE EMPLOYER WITHIN THE MEANING OF SECTION 9 (c)(1) AND SECTION 2 (6) AND (7) OF THE NATIONAL LABOR RELATIONS ACT, 1935, AS AMENDED BY THE LABOR MANAGEMENT RELATIONS ACT, 1947, AS AMENDED BY PUBLIC LAW 86-257, 1959, AND 93-360, 1974 - (TITLE I - AMENDMENT OF NATIONAL LABOR RELATIONS ACT) - SEC. 101, SEC. 9 - PARAGRAPH 5 (e) 1.

Michael Scott Dahl
Terry Hedtke
Earl Bechtel
Carolyn E. Cox
David N. Cox
Gaye D. Holley
Harley N Bailey
Dennis D. Swan
Erick M. Flodin
Elliot Lawrence Munson
Michael C Munson
Richard T Mayer
Kirk [illegible]
Gary L. Baker
Roger M Wille

William E. Crow
DC Burns
C Hunter
Thomas E. Walsh
Robert W. King
David J. Jost
Dan Campbell
William A. Brown
John Davidson
Joseph G. Murray
James J. Reynolds
Frank McElroy
Barry D Zehm
Charles J. Faber
Leonard A Dangelo
Scott Ogden
Alfred Sandoval
Raymond Scott
William Gaskill

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

PETITION

28-RC-111

December 15, 1980

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

1. Purpose of this Petition (If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.)

- [ ] RC-CERTIFICATION OF REPRESENTATIVE—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- [ ] RM-REPRESENTATION (EMPLOYER PETITION)—One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- [ ] RD-DECERTIFICATION—A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.
- [ ] UD-WITHDRAWAL OF UNION SHOP AUTHORITY—Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- [x] UC-UNIT CLASSIFICATION—A labor organization is currently recognized by employer, but petitioner seeks clarification of placement of certain employees (Check one)
  - [x] in unit not previously certified
  - [ ] in unit previously certified in Case No. _____
- [ ] AC-AMENDMENT OF CERTIFICATION—Petitioner seeks amendment of certification issued in Case No. _____

(Attach statement describing the specific amendment sought.)

2. Name of Employer: ARIZONA PUBLIC SERVICE COMPANY
Employer representative to contact: Joseph Galinas
Phone No.: 271-2451

3. Address(es) of establishment(s) involved (Street and number, city, State, and ZIP Code):
Palo Verde Nuclear Generating Station

4a. Type of establishment (Factory, mine, wholesaler, etc.): Nuclear Generating Station
4b. Principal product or service: Electricity

5. Unit involved (In CC petitions, describe PRESENT bargaining unit and attach description of proposed clarification.):
Included: All employees employed by the Employer in its facilities in the State of Arizona and New Mexico in the job classifications set forth in the collective bargaining agreement between the Employer and International Brotherhood of Electrical Workers, Local Union No. 387, AFL-CIO, which agreement is effective until April 1, 1982.
Excluded: All other employees, official clerical employees and guards, professional employees and supervisors as defined in the Act.

6a. Number of employees in unit: Present 2000
Proposed (by UC, AC, RM petitions) 2045

6b. Is this petition supported by 30% or more of the employees in the unit claimed appropriate? [ ] Yes [ ] No

(If you have checked box RC or RM above, check and complete EITHER item 7a or 7b, whichever is applicable.)

7a. [ ] Request for recognition as Bargaining Representative was made on _____ (Month, day, year) and declined on or about _____ (Month, day, year). (If no reply received, so state.)

7b. [ ] Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8. Recognition or Certified Bargaining Agent (If there is none, so state):
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 387
Affiliation: AFL-CIO
Address: 5818 North 57th Street, Phoenix, AZ 85014

9. Date of execution of current agreement, if any (Month, day, and year): April 1, 1982
10. If there is a current or pending contract in your industry covering employees in unit claimed appropriate, state name of parties, location of unit, and expiration date of contract (Month, day, and year):

11a. Is there now a strike or picketing at the Employer's premises? Yes ___ No X

11b. If so, approximately how many employees are participating?

11c. The picketing has been conducted by or on behalf of _____ (Name of labor organization)

Organized on _____ (Month, day, year)

11d. Other organizations or individuals known to have a direct interest in this matter.

Name	Affiliation	Address	Nature of Claim (Recognition or jurisdiction claimed by Petitioner or other labor organization)
None			

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 387, AFL-CIO
By: Doyle D. Durrett (Signature of representative or person filing petition)
Attorney (Title, if any)
Address: 5818 North Seventh Street, Phoenix, AZ 85014 (Street and number, city, State, and ZIP Code)
Telephone number: 264-1846

WILLFULLY FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001).

Office - Supreme Court, U.S.
FILED
DEC 6 1983
ALEXANDER L. STEVAS,

No. 83-743

In the Supreme Court of the United States

OCTOBER TERM, 1983

ARIZONA PUBLIC SERVICE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 387

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ROBERT C. BELL, JR.
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the Board acted within its discretion in finding that employees at petitioner's Palo Verde power plant constitute an accretion to the existing systemwide bargaining unit of production and maintenance employees.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-743

ARIZONA PUBLIC SERVICE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
AFL-CIO, LOCAL 387

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 21-27) is unpublished. The decisions and orders of the National Labor Relations Board (Pet. App. 28-46, 47-71) are reported at 256 N.L.R.B. 400 and 259 N.L.R.B. 484.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1983. A petition for rehearing was denied on July 15, 1983 (Pet. App. 72-73). The petition for a writ of certiorari was filed on October 13, 1983. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a public utility supplying electric power throughout Arizona with headquarters in Phoenix. It operates seven nonnuclear generating plants in Arizona and New Mexico, and at the time period relevant here was in the process of building a nuclear power plant at Palo Verde, Arizona (the Palo Verde plant). Pet. App. 31; Tr. 352.[1] All of the plants, including the Palo Verde plant, are part of a single integrated power system centrally administered by the vice president of electrical operations in Phoenix.[2] Plant managers at each unit report to that office. The electric power generated by each plant feeds into the system and is centrally dispatched to customers throughout petitioner's service area. Pet. App. 31-32, 40-41.

The Union[3] has represented petitioner's production and maintenance employees in a single systemwide bargaining unit since 1947. When petitioner has by acquisition or construction added new plants to its system, employees at the new facilities have been incorporated into the contractual systemwide unit. Pet. App. 33-34. A total of about 1200 unit employees work at petitioner's seven nonnuclear plants (Pet. App. 33; Tr. 471-472). Petitioner began hiring production and maintenance employees at the Palo Verde nuclear plant in 1977. An initial complement of 62 employees was hired, including 12 or 13 (20%) who transferred from other plants in the system. Pet. App. 35-36; Tr. 62-63.[4]

---

[1]"Tr." references are to the transcript of the hearing before the Board in the representation proceeding. "Exh." and "Jx" refer to petitioner's exhibits and joint exhibits, respectively, introduced at the hearing.

[2]The Palo Verde plant, 55 miles from Phoenix, is one of the closest to petitioner's headquarters (Pet. App. 31).

[3]International Brotherhood of Electrical Workers, AFL-CIO, Local 387.

[4]Petitioner asserts (Pet. 7) that there are currently 500 nonsupervisory employees at Palo Verde. This claim is not supported by the

The Palo Verde employees and bargaining unit employees perform similar functions under the same or comparable job classifications.[5] Thus, virtually all of the production and maintenance classifications at Palo Verde are included in the collective bargaining agreement (Tr. 474, 484-489; Jx 1 at 48-57, Exh. 5). The Palo Verde employees and the bargaining unit employees share similar terms and conditions of employment. The Palo Verde employees have the same vacation, holiday, pension, dental, and medical benefits as those contained in the collective bargaining agreement (Pet.

---

record. In any event, the parties stipulated, and the Board found, "that although the number of employees will continue to expand, the present complement is representative" (Pet. App. 29), and petitioner does not contend that the Board's accretion determination was premature.

[5]Palo Verde employees classified as janitors, storekeepers and warehousemen perform the same duties as similarly classified bargaining unit employees (Tr. 85, 98). The duties of the Palo Verde electricians are the same as those of petitioner's other electricians (Tr. 86). Palo Verde employees classified as instrument and control (I & C) repairmen and technicians perform the same functions of calibrating, repairing and installing instruments that I & C repairmen perform at petitioner's other plants (Tr. 85, 419-420).

All plants have employees classified as "operators," and the operators at Palo Verde perform functions similar or parallel to those performed by the operators at the fossil fuel plants. At both Palo Verde and the fossil fuel plants, the operator functions are divided between operators who sit in the control room at control panels and those who travel throughout the plant checking equipment (Tr. 356-358, 481-482). The stationary operators—classified as control operators in the fossil fuel plants and nuclear operators level III at Palo Verde—are responsible for monitoring the condition of the plant and adjusting switches and knobs on the control panels in response to information about the condition of the plant conveyed by the instruments in the control room (Tr. 358-359, 371-372, 479). The mobile operators—classified as auxiliary or assistant operators at the fossil fuel facilities and as nuclear operators level II at Palo Verde—inspect the equipment throughout the plant (Tr. 481, 356-357). Nuclear operator level I is an operator trainee position and is similar to the operator trainee classification at the fossil fuel plants (Tr. 356).

App. 34-35; Tr. 114-115).[6] Furthermore, the salaries of Palo Verde employees are identical or comparable to the salaries earned by bargaining unit employees in the same or analogous classifications (Exh. 17; Jx 1 at 48-56).

In December 1980, the Union requested recognition as the collective bargaining representative of the Palo Verde employees, contending that they should be an accretion to the existing systemwide unit (Tr. 496).[7] On December 15, 1980, petitioner filed a petition with the Board requesting a representation election among the Palo Verde employees. On the same day the Union filed a petition for clarification of the systemwide unit to include the Palo Verde employees. Pet. App. 30-31.

2. On June 15, 1981, the Board issued a decision finding that the Palo Verde employees constitute an accretion to the systemwide production and maintenance unit (Pet. App. 43-45). The Board based its conclusion upon analysis of a number of factors, including the longstanding policy favoring systemwide bargaining units in the utility industry enunciated in *Baltimore Gas & Electric Co.*, 206 N.L.R.B. 199, 201 (1973), the integrated nature of petitioner's operations, the "community of employee interests" shared by the Palo Verde employees with their counterparts throughout the system, and the parties' bargaining history (Pet. App. 38-44). On the basis of its accretion finding, the Board dismissed petitioner's election petition and ordered that the existing unit be clarified to include the production and maintenance employees working at Palo Verde (Pet. App. 45).

---

[6]The Palo Verde employees are treated no differently than petitioner's other unrepresented employees, all of whom receive many of the same benefits received by represented employees (Pet. App. 34-35; Tr. 131-132, 144-145, 274, 440-441, 491).

[7]An accretion is a group of new employees that are added to an existing bargaining unit without an election (Pet. App. 22 n.1).

3. Petitioner refused to recognize the Union as the representative of the Palo Verde employees and the Union filed an unfair labor practice charge in August 1981. The Board's General Counsel issued a complaint and moved for summary judgment on the ground that all issues relevant to the unfair labor practice charge were, or could have been, litigated in the prior representation proceeding. The Board granted summary judgment, finding that petitioner violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and ordering petitioner to recognize and bargain with the Union as representative of the Palo Verde employees. Pet. App. 55-56, 61-62.

4. The court of appeals enforced the Board's order. The court stated (Pet. App. 23-25; citations omitted):

> The question as to whether a group of employees represents an accretion to an existing bargaining unit is similar to the issue of the appropriateness of the determination of a bargaining unit. Such a determination is within the particular expertise of the NLRB; and it will not be disturbed absent an abuse of discretion.
>
> Relevant factors to be weighed in making the determination of whether a new group of employees should be considered an accretion include "functional integration of the business, centralized control of management, similarity of working conditions, collective bargaining history, local power to hire and fire, lack of employee interchange, [and] geographical distance."
>
> The critical determinant, however, is whether the employees share a substantially identical community of interests with the existing bargaining unit.

ARGUMENT

In determining whether a group of employees at a new facility—or resulting from any other change in an employer's operations—constitutes an accretion to an existing

bargaining unit, the Board examines a variety of factors. These include the similarity between the old and new groups in working conditions, job classifications, and skills and functions, as well as the integration of the employer's operations, the interchangeability of employees between the two groups, the geographic proximity of the job sites of the two groups, the centralization of labor relations and managerial control, and the employer's collective bargaining history. *The Great A & P Tea Co.*, 140 N.L.R.B. 1011, 1021 (1963).[8] Where the relevant factors demonstrate that the new employees have a community of interest sufficiently distinct from the existing unit to constitute an appropriate separate bargaining unit, the Board will not find an accretion. *Melbet Jewelry Co.*, 180 N.L.R.B. 107, 110 (1969); *Sheraton-Kauai Corp.* v. *NLRB*, 429 F.2d 1352, 1356 (9th Cir. 1970). However, where the new employees would not constitute an appropriate separate bargaining unit and share a community of interest with the unit employees, they will be accreted to the existing unit. See e.g., *NLRB* v. *Retail Clerks Local 588*, 587 F.2d 984, 987 (9th Cir. 1978); *NLRB* v. *St. Regis Paper Co.*, 674 F.2d 104, 107-108 (1st Cir. 1982); *Universal Security Instruments, Inc.* v. *NLRB*, 649 F.2d 247, 253 (4th Cir.), cert. denied, 454 U.S. 695 (1981).

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[8]The courts of appeals uniformly have approved the Board's consideration of these factors. See, *e.g.*, *NLRB* v. *St. Regis Paper Co.*, 674 F.2d 104, 108 (1st Cir. 1982); *Universal Security Instruments, Inc.* v. *NLRB*, 649 F.2d 247, 253 (4th Cir.), cert. denied, 454 U.S. 965 (1981); *Kaynard* v. *Mego Corp.*, 633 F.2d 1026, 1030-1031 (2d Cir. 1980); *Lammert Industries* v. *NLRB*, 578 F.2d 1223, 1225 (7th Cir. 1978); *NLRB* v. *Security-Columbian Banknote Co.*, 541 F.2d 135, 140-141 (3d Cir. 1976); *NLRB* v. *Sunset House*, 415 F.2d 545, 548 (9th Cir. 1969); *NLRB* v. *Food Employers Council, Inc.*, 399 F.2d 501 (9th Cir. 1968); *International Union, UAW* v. *NLRB*, 231 F.2d 237, 243 (7th Cir.), cert. denied, 352 U.S. 908 (1956).

The Board's policy balances the right of employees to select a bargaining agent against the policy of maintaining stability in established bargaining relationships (*The Great A & P Tea Co.*, 140 N.L.R.B. at 1023). Where the unrepresented employees have no separate community of interests from unit employees, assimilation of the unrepresented employees into the existing unit is necessary to preserve the stability of the existing bargaining relationship, for it places all similarly situated employees in the same position with respect to establishment of terms and conditions of employment. While the accreted employees do not have the opportunity to vote, they are in no different position in this regard from new employees who are hired for positions already included in an existing unit; such employees are logically indistinguishable from the accreted employees. On the other hand where the unrepresented employees would constitute an appropriate separate bargaining unit, they can properly be afforded a separate choice of a bargaining representative, and the interest in according them that choice outweighs any stability interest.[9]

Petitioner concedes (Pet. 4 n.2, 17-18) that the Palo Verde employees would not constitute an appropriate separate bargaining unit because of "the established principle of systemwide bargaining units in the public utility industry."[10] Petitioner contends (Pet. 11) that nevertheless

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[9]Petitioner's assertion (Pet. 10) that the Board's accretion determinations are subject to strict scrutiny upon judicial review is incorrect. The cases cited by petitioner stand only for the proposition that the Board itself will apply the accretion doctrine restrictively, because of the need to balance the statutory rights involved. See *NLRB* v. *Security-Columbian Banknote Co.*, 541 F.2d 135, 140 (3d Cir. 1976). The determination in each case is committed to the Board's discretion and should not be overturned unless found to be arbitrary and capricious. See *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947); *Universal Security Instruments Inc.*, 649 F.2d at 253.

[10]See *Baltimore Gas & Electric Co.*, 206 N.L.R.B. 199, 201 (1973).

the Palo Verde employees do have a "separate group identity" from the unit employees and therefore are entitled to an election to determine whether they wish to be included in the systemwide unit. There is no merit to that contention. The cases on which petitioner relies (Pet. 11-12) present situations where 1) a separate bargaining unit was found appropriate,[11] or 2) a group sought to be accreted had existed since the bargaining unit's formation but had been excluded from the unit by the parties, or had come into existence after a union's recognition but had been knowingly excluded from the unit for a substantial period of time.[12] In the latter situations, the bargaining history

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[11] *Pacific Northwest Bell Telephone Co.* 253 N.L.R.B. 795, 796 (1980).

[12] Thus, in *Photype, Inc.*, 145 N.L.R.B. 1268, 1272-1273 (1964), the Board, in ordering an election, emphasized the fact that the unrepresented employees sought to be accreted to the existing unit had been working for the employer for seven years and that the employees had been excluded from the bargaining unit for that period of time. Similarly, in *Remington Rand Division*, 190 N.L.R.B. 488, 489 (1971), the decisive factor in the Board's refusal to find an accretion and its direction of an election was a bargaining history of long-term exclusion of certain job classifications from the existing unit.

Petitioner's reliance on *Duke University*, 227 N.L.R.B. 1627 (1977); *Mt. Sinai Hospital*, 233 N.L.R.B. 507 (1977); *Metropolitan Hospital*, 223 N.L.R.B. 282 (1976); *Comax Telcom Corp.*, 219 N.L.R.B. 688 (1975); and *Connecticut Light & Power Co.*, 121 N.L.R.B. 768 (1958), is similarly misplaced. No party in those cases contended that the unrepresented employees constituted accretions to the existing bargaining units. Furthermore, the employees had worked outside the established bargaining units for a number of years before the issue of their representational status was raised.

Kroger Company, 201 N.L.R.B. 920 (1973) and *Utah Power & Light Co.*, 258 N.L.R.B. 1059 (1981) are also not accretion cases. *Kroger Company* involved employees who shared interests with two existing bargaining units represented by different unions. The Board directed an election to enable the employees to choose. *Utah Power & Light Co.* dealt with a group of professional employees who had been included in a unit with nonprofessional employees without an opportunity to vote. The Board directed a decertification election based on Section 9(b)(1) of

demonstrates that exclusion has not resulted in an unstable bargaining relationship and that the parties themselves have recognized that exclusion does not interfere with the bargaining relationship. Thus, unlike here, there is no countervailing policy to warrant limiting employee free choice. See *The Bendix Corp.*, 168 N.L.R.B. 371, 372 (1967).

Petitioner also appears to contend (Pet. 14-16) that the Palo Verde employees should not be found to be an accretion because they perform different functions and have different working conditions due to the fact that Palo Verde is a nuclear facility. This contention merely takes issue with the Board's finding, upheld by the court of appeals, that the Palo Verde employees share a community of interest with the unit employees based on "centralized labor relations policies, the similarity of classifications, functions, and terms and conditions of employment of Palo Verde employees and bargaining unit employees, and the transfers from unit positions to Palo Verde production and maintenance positions" (Pet. App. 42). This fact-bound disagreement raises no issue warranting review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1958). In any event, the Board's findings are amply supported by the record (see pp. 3-4, *supra*).

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the Act, 29 U.S.C. 159(b)(1), which prohibits including professional employees in such a unit unless the professionals vote for inclusion. There is no comparable statutory mandate here and the case is thus inapposite.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

ARIZONA PUBLIC SERVICE
COMPANY, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO, LOCAL 387

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 387 IN OPPOSITION

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QUESTION PRESENTED

Did the National Labor Relations Board abuse its discretion in finding the production and maintenance employees at the Arizona Public Service's newly constructed Palo Verde Power Plant to constitute an accretion to the existing system-wide bargaining unit of production and maintenance employees represented by International Brotherhood of Electrical Workers, AFL-CIO, Local 387?

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BRIEF FOR THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 387 IN OPPOSITION

STATEMENT

1. Background.

Arizona Public Service (hereinafter "APS") is a public utility which supplies electric power throughout Arizona. (R. 7.) Its headquarters are located in Phoenix. (R. 65.) APS operates six fossil fuel and one small hydro-electrical generating plants at separate locations in Arizona and New Mexico. (R. 68, 352.) The power generated by each of these plants feeds into one distribution system and is dispatched to customers by dispatchers located in Phoenix. (R. 351.)

Since as early as 1947, APS has recognized the International Brotherhood of Electrical Workers, AFL-CIO, Local 387

(hereafter "the Union"), as the collective bargaining representative of the production and maintenance employees employed by APS throughout its system. (R. 442.) Since the initial recognition, production and maintenance employees at newly acquired or constructed facilities have uniformly been incorporated into the existing system-wide bargaining unit. (R. 447-448.)[1/] Contrary to APS (Brief 5), none of such employees were added to the bargaining unit through Board certifications. (R. 457-459.)

1/ As the Board noted (Pet. App. 43), the parties disagreed about the circumstances surrounding the extending of recognition to the Union as representative of employees at facilities as they were added to the utility system over the years. Thus, while APS asserts that it extended recognition only upon some showing of the Union's majority status at each new facility, the Union's evidence showed that the Union had not demonstrated its majority status and that the Union had simply bargained about new plants prior to their opening. (R. 448, 467-469.) The Union's evidence (R. 457-459) further showed that it petitioned for elections only when it sought to represent previously existing but unrepresented job classifications at existing plants.

In 1972, APS began construction of a nuclear power plant at Palo Verde, Arizona, 55 miles from Phoenix. (R. 27-29.) At the time of the hearing in this matter, the plant had not been put into operation but there had been employed approximately 62 employees in production and maintenance classifications. Twelve to 13 of these employees had been previously employed at one of the other APS power plants. (R. 38, 62.)

2. The representation proceeding.

In December, 1980, after having failed to agree that the production and maintenance employees at the Palo Verde Plant should be deemed accreted into the single system-wide bargaining unit, both APS and the Union filed Petitions with the NLRB on December 15, 1980. APS filed an RM Petition seeking an election. The Union filed a UC Petition

seeking an order clarifying the collective bargaining unit as including the production and maintenance employees at the Palo Verde Plant. (R. 496; Pet. App. 89, 94.)

Following the hearing and a transfer of the case to the Board, the Board, on June 5, 1981, issued its decision finding that the 62 Palo Verde production and maintenance employees constituted an accretion to the 1,200 employee system-wide production and maintenance unit represented by the Union. (Pet. App. 29.)

After the Board's decision, a number of the Palo Verde employees filed an obviously untimely petition. It was dismissed. (Pet. App. 90-93.)

3. The unfair labor practice proceeding.

Beginning in June, 1981, the Union requested that APS deal with it as the exclusive representative of the Palo Verde

employees. APS refused; the Union filed an unfair labor practice charge; and on September 1, 1981, a complaint issued charging the Company with a refusal to bargain. APS answered, admitting its refusal, but defended on the grounds that the Board had erred in determining that the Palo Verde employees constituted an accretion to the existing bargaining unit. The Board on December 3, 1981, issued its Decision and Order granting the Board's General Counsel's Motion for Summary Judgment, finding APS to have refused to bargain in violation of the Act. (Pet. App. 47-67.)

Upon review by the Ninth Circuit Court of Appeals, that Court reviewed the several factual conclusions upon which the Board's Decision was based and concluded that the Board's legal conclusion that the accretion determination was proper. (Pet. App. 21-27.)

SUMMARY OF ARGUMENT

To the NLRB and to the circuit courts, the concept of accretion has long been accepted as a viable doctrine available to the NLRB in resolving bargaining unit issues. Its application in this case was neither novel nor precedent-setting; nor was it without factual support.

ARGUMENT

1. Standard of review.

The Board's function in determining whether there has been an accretion in a given situation "is similar to its function of determining the appropriateness of particular units for bargaining purposes. . . . The determination is one involving the Board's discretion and should not be set aside unless a reviewing court is convinced that the Board has acted in an arbitrary and capricious manner." Lammert

Industries v. NLRB, 578 F.2d 1223, 1225 (7th Cir., 1978), quoting NLRB v. R. L. Sweet Lumber Co., 515 F.2d 785, 794 (10th Cir., 1975). See also Sheraton-Kauai Corp. v. NLRB, 429 F.2d 1352, 1355 (9th Cir., 1970); NLRB v. Sunset House, 415 F.2d 545, 547-548 (9th Cir., 1969); Universal Security Instruments, Inc. v. NLRB, 649 F.2d 247 (4th Cir., 1981) [cert. den. 454 U.S. 965]; and NLRB v. Baton Rouge Waterworks Co., 417 F.2d 1065 (5th Cir., 1969).

2. Applicable principles.

An accretion is simply the addition of employees to an already existing unit where there exists such a community of interest that the accreted employees are properly governed by the larger group's choice of bargaining representative. NLRB v. Food Employers Council, Inc., 399 F.2d 501, 502 (9th Cir., 1968); Lammert Industries v. NLRB, supra. The accretion issue typically

arises in the context of the opening of a new facility [Goodyear Tire & Rubber Company, 195 NLRB 767 (1972), enf. 474 F.2d 1336 (2d Cir., 1973); Armour & Co., 172 NLRB 1649 (1968)], the subdivision of a facility [Parkview Drugs, Inc., 138 NLRB 194, 195 (1962)], or some other operational change that creates a new group of employees [Massey Ferguson, Inc., 202 NLRB 193 (1973); The Great A & P Tea Co., 140 NLRB 1011 (1963)].

The Board, in determining whether a new group of employees is accreted into an existing bargaining unit, must balance the right of employees to select a bargaining agent against the concomitant statutory policy of maintaining stability of established bargaining relationships. The Great A & P Tea Co., supra. In striking this balance, the Board examines a variety of factors including integration of operations;

centralization of managerial and administrative control; similarity of working conditions, functions, job classifications, and skills; centralization of control over labor relations; bargaining history; interchangeability of employees; and geographic proximity. Universal Security Instruments, Inc. v. NLRB, supra; NLRB v. Sunset House, supra; NLRB v. Baton Rouge Waterworks Co., supra. It is not necessary that all of the listed factors be present. Rather, it is for the Board to determine "the factors relevant to the accretion issue in the case under consideration . . . [and] then decide the relative weight to be attributed to each factor." Universal Security Instruments, Inc. v. NLRB, supra. Where the relevant factors demonstrate that the new employees have a community of interest sufficiently distinct from the existing unit to constitute a separate appropriate unit, the Board

will not find an accretion. Melbet Jewelry Co., 180 NLRB 107 (1969), cited with approval Sheraton-Kauai Corp. v. NLRB, supra. However, where the new employees have no separate unit identity and inclusion would result in a more efficient collective bargaining relationship, the Board appropriately determines that the new employees do constitute an accretion to an existing unit. See Westinghouse Electric Corp. v. NLRB, 440 F.2d 7, 11 (2d Cir., 1971); NLRB v. Retail Clerks Local 588, 587 F.2d 984, 987 (9th Cir., 1978).

In making unit determinations in the utility industry, the Board has placed particular emphasis on the factors of operational integration and centralized administration. Recognizing that the utility industry is characterized by a high degree of operational integration, the Board generally is reluctant to find

appropriate units that are less than system-wide in scope. See Baltimore Gas & Electric Co., 206 NLRB 199, 201 (1973) (unit limited to employees at employer's eight fossil fuel plants inappropriate); Colorado Interstate Gas Co., 202 NLRB 847, 848 (1973); Michigan Wisconsin Pipe Line Co., 194 NLRB 469 (1971) (one district not appropriate; employer was highly integrated and regulated flow of gas from headquarters).

The Board's reluctance to fragmentize a utility's operations is based upon "the economic reality that the public utility industry is characterized by a high degree of interdependence of its various segments and that the public has an immediate and direct interest in the uninterrupted maintenance of the essential services that this industry alone can adequately provide." Baltimore Gas & Electric Co., supra. Indeed, the Board finds less than stystem-

wide units to be appropriate only where employees work in separate administrative subdivisions or service distinct geographic areas, have separate communities of interest, and have no system-wide bargaining history. See Baltimore Gas & Electric Co., supra; Colorado Interstate Gas Co., supra. See also Indiana Telephone Co., Inc., 229 NLRB 187 (1977).

To round off this statement of applicable principles, it is pertinent to note specifically the two lines of cases where the accretion doctrine will not apply. First, there are those cases, as noted above, involving the addition of new employees who have a community of interest sufficiently distinct from the existing unit to constitute in itself a separate bargaining unit. Melbet Jewelry Co., supra.

The second type situation exists (1) when a group sought to be accreted has

existed since the bargaining unit's formation but has been excluded from the unit by the parties, (2) when a group has come into existence after a union's recognition but has been knowingly excluded from the unit for a substantial period of time, or (3) when there is some other evidence that the parties intended to exclude the particular group of employees. In such circumstances, the bargaining history demonstrates that the exclusion has not resulted in an unstable bargaining relationship and that the parties themselves have recognized that exclusion does not interfere with the bargaining relationship. Thus there is no countervailing policy to warrant limiting employee free choice. See The Bendix Corporation, 168 NLRB 371, 372 (1967); Gould National Batteries, Inc., 157 NLRB 679, 681 (1966); and Plough, Inc., 203 NLRB 818 (1973).

Phototype, Inc., 145 NLRB 1268 (1964) and Remington Rand Division, 190 NLRB 844 (1971), upon which APS relies (Brief 12), are both cases in which there was a bargaining history demonstrating the exclusion of, or intent to exclude, the employees sought to be accreted. In Phototype, the Board emphasized the fact that the unrepresented employees had been working for the employer for seven years and that the employees had been excluded from the bargaining unit for that period of time. Similarly, in Remington Rand Division, the decisive factor in the Board's refusal to find an accretion was the bargaining history of long-term exclusion of certain job classifications from the existing unit.

Duke University Hospital, 227 NLRB 1627 (1977); Mt. Sinai Hospital, 233 NLRB 507 (1977); and Comax Telcom Corp., 219 NLRB 688 (1975), all relied upon by the

Petitioner APS, involved factual situations involving the type situation where the unrepresented employees had worked outside the established bargaining unit for a number of years before the issue of their representational status was presented. Hence the doctrine of accretion was not applicable. For the same reason, the Petitions filed by the Union relative to meter readers at APS, warehousemen at APS, fuel specialists at APS, cathodic protection testers at APS, auto parts clerks at APS, and credit department employees at APS (Pet. Brief 5-6; Pet. App. 81-88) specifically sought elections rather than unit clarifications as in the instant case. All of such Petitions involved employee groups who had long been knowingly excluded from the production and maintenance unit. They were not new employees being added to existing

classifications covered by the agreement. "They were long-time employees" who had not been covered by the collective bargaining agreement. (R. 495, ll. 6-9; R. 493-496.)

3. The Board properly exercised its discretion in finding the Palo Verde employees to be an accretion.

A number of factors--the Company's centralized and integrated operation, its centralized control of labor relations, the similarity of employee terms and conditions of employment and job functions, employee transfers and the system-wide bargaining history--weigh heavily in favor of the Board's accretion finding. Of equal importance, the record shows--and the Company admits--that the Palo Verde employees do not constitute a separate appropriate unit for purposes of collective bargaining.

As the Board found (Pet. App. 32), the Palo Verde Plant neither constitutes a separate administrative subdivision nor serves a distinct geographic area, but rather is part of a highly integrated and centralized operation. Thus, as shown in the Statement, all electricity produced--regardless of the generating process--feeds into one system and is provided to customers by dispatchers located in a central office in Phoenix. The integration of operations is reflected, as the Board observed (Pet. App. 32), in the Company's centralized administration of the operation of the power plants. The generation, transmission and distribution of electric power is controlled and monitored by the corporate vice president of electrical operations and his supporting staff. This corporate official, to whom all the plant managers ultimately

report, is responsible for overseeing all of the Company's generating facilities. (R. 45, 574-575.)

The record also demonstrates that significant aspects of the Company's labor policies are centrally determined and that the Company does not treat the Palo Verde Plant differently from its other facilities for labor relations purposes. The benefits granted to Palo Verde employees are determined at the Company's headquarters, and all of the Company's unrepresented employees, wherever located, receive the same benefits. (R. 274.) Job openings at any facility are posted at all Company offices. Plant policies applicable to Palo Verde employees with respect to salary administration, grievances, and job bidding have been established at the corporate level and

apply to all of the Company's unrepresented employees. (R. 131-132, 144-145, 54.) These policies, along with additional Company rules and policies, are contained in an employee handbook which is distributed to all employees. (R. 440-441, 491.) The record also shows that headquarters officials are involved in the implementation of labor relations policies in the individual plants. For example, while grievances may be resolved at the plant level, the Company provides for an appeal to the corporate level for final decision. In addition, with respect to job vacancies, only a designated corporate official can approve a decision not to post a job.

As the Board also found (Pet. App. 34-35), the Palo Verde employees and the bargaining unit employees share similar

terms and conditions of employment. The Palo Verde employees have the same vacation, holiday, pension, dental, and medical benefits as those contained in the collective bargaining agreement. (R. 114-115.)[2/] Furthermore the salaries of

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2/ The record shows some differences in benefits such as sick leave, overtime, and participation in short term disability and savings plans between bargaining unit employees and all unrepresented employees. These different benefits are not, however, unique to Palo Verde employees and thus do not demonstrate that the Palo Verde facility has a separate identity from other Company facilities.

APS (Pet. Brief 15) points to two benefits assertedly unique to Palo Verde employees. These are the Company's provision of tools for work at Palo Verde and the Company's transportation of Palo Verde employees to work. With respect to providing tools, the record shows that the Company provides many tools to employees at the fossil fuel plants. (R. 340, 434, 490.) The additional benefit of transportation--provided because Palo Verde is located in the desert and a substantial distance from residential communities (R. 120-121)--plainly does not undermine the strong shared interests resulting from the commonality of most major benefits.

Palo Verde employees are identical or comparable to the salaries earned by bargaining unit employees in the same or analogous classifications. (E. Ex. 17, R. 164, 171; Jt. Ex. 1a, R. 11, 14.)

Further supporting the Palo Verde accretion is the fact that, as the Board found (Pet. App. 36), the Palo Verde employees and bargaining unit employees perform similar functions under the same or comparable job classifications. Thus, virtually all of the production and maintenance classifications at Palo Verde are included in the collective bargaining agreement. (R. 474, 484-489; Jt. Ex. 1a, pp. 48-57, R. 11, 14; E. Ex. 5, R. 30, 32.) Palo Verde employees classified as janitors, storekeepers and warehousemen perform the same duties as similarly classified bargaining unit employees. (R. 85, 98.) The duties of the Palo

Verde electricians are the same as the Company's other electricians. (R. 86.) Palo Verde employees classified as instrument and control (I & C) repairmen and technicians perform the same functions of calibrating, repairing and installing instruments that I & C repairmen perform at the Company's other plants. (R. 851, 419-420.)

At both Palo Verde and the fossil fuel plants, the operator functions are divided between operators who sit in the control room at control panels and those who travel throughout the plant checking equipment. (R. 356-358, 481-482.) The stationary operators--classified as control operators in the fossil fuel plants and nuclear operators level III at Palo Verde--are responsible for monitoring the condition of the plant and adjusting switches and knobs on the

control panels in response to information about the condition of the plant conveyed by the instruments in the control room. (R. 358-359, 371, 479.) The mobile operators--classified as auxiliary or assistant operators at the fossil fuel facilities and as nuclear operators level II at Palo Verde--inspect the equipment throughout the plant. (R. 481, 356-357.) Nuclear operator level I is an operator trainee position and thus is similar to the operator trainee classification at the fossil fuel plants. (R. 356, Jt. Ex. 1a, p. 53, R. 11, 14.)

The basic similarity of Palo Verde and bargaining unit job functions is demonstrated by the fact that 20 percent of the 62 production and maintenance employees at Palo Verde at the time of the hearing transferred from the

Company's other facilities using the Company's job bidding procedure (R. 62-63), and these transferees are, as a company witness stated (R. 342), well trained. The transferees include one employee who transferred from an operator position at the Company's Four Corners Plant to a nuclear operator level III position at Palo Verde, as well as employees who transferred to electrician and I & C positions. (R. 380-381, 415-416, 432, 572, E. Ex. 17, R. 164.)

Finally, the Board reasonably found the bargaining history here to militate in favor of accretion. Thus, the record shows that, since the Company's initial recognition of the Union around 1947, bargaining has always been on a system-wide basis. Furthermore, production and maintenance employees at newly acquired

or constructed facilities have uniformly been incorporated into the unit. (R. 447.)

In sum, measured against established accretion standards and the bargaining unit policies applicable to the utility industry, the record evidence of integrated and centralized operations, centralized labor policies, similar working conditions and job functions, employee transfers, and system-wide bargaining history amply demonstrate both that the Palo Verde employees do not constitute an appropriate unit for collective bargaining and that "such a community of interest exists among the entire group that the additional employees have no separate unit identity" and "thus . . . are properly governed by the larger group's choice of bargaining representative." NLRB v.

Security-Columbian Bank Note Co., 541 F.2d 135, 140 (3d Cir., 1976). Accord: Lammert Industries v. NLRB, supra; Universal Security Instruments, Inc. v. NLRB, supra; NLRB v. Baton Rouge Water-works Co., supra.

Accordingly, the Board acted well within its discretion by accreting the Palo Verde employees into the existing system-wide unit.

CONCLUSION

This Court should not grant the instant Petition for Writ of Certiorari.

Respectfully submitted this 11th day of November, 1983.

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CERTIFICATE OF SERVICE

I, A. D. Ward, counsel of record for International Brotherhood of Elecrical Workers, AFL-CIO, Local 387, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th day of November, 1983, I served one copy of the Brief for the International Brotherhood of Electrical Workers, AFL-CIO, Local 387 in Opposition by depositing in a mailbox, with first-class postage prepaid, and properly addressed to the following:

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CASE NO. 83-743

UNITED STATES SUPREME COURT

OCTOBER, 1983 TERM

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JURISDICTION

This Reply Brief to Respondent's National Labor Relations Board[1] Response is submitted by Arizona Public Service[2] pursuant to Rules of the Supreme Court of the United States, Rule 22.5.

ARGUMENT

I. BARGAINING HISTORY

Petitioner takes exception to the NLRB's misleading statement in its Response to Petitioner's Writ of Certiorari, at page 2, which says, without more, that "[w]hen petitioner has by acquisition or construction added new plants to its system, employees at the new facilities have been incorporated into the contractual systemwide unit."

1/ Hereinafter "NLRB."

2/ Hereinafter "APS."

The NLRB's statement omits the uncontroverted fact that employees at newly acquired or constructed APS facilities were "incorporated" into the Local 387[3/] bargaining unit only after the Union achieved and proved majority status among those employees, either through prior representation, NLRB certification after an NLRB-conducted election, or merger with predecessor labor organizations. It was only on that basis that APS recognized the Union as the collective bargaining representative of newly acquired or constructed facilities' employees. (R. 461, L. 9 - R. 467, L. 18; R. 180, L.

3/ Hereinafter the "Union."

14 - R. 181, L. 25; R. 183, L. 17 - R. 184, L. 10; R. 495, L. 10-21).[4/]

In this case the Union specifically admitted that it does not represent and has never represented a majority of the Palo Verde employees. (R. 353, L. 21 - R. 354, L. 14; R. 368, L. 7-10; R. 354, L. 17 - R. 355, L. 9; R. 496, L. 12-14.) Bargaining history, thus, cannot be used to justify the "incorporation" of the Palo Verde employees into the Union's bargaining unit. To the contrary, bargaining history, as a criterion, would require the union to prove majority status, through, in this case, an election.

4/ References to the record of the underlying NLRB representation hearing are designated by "R" followed by the appropriate page number or numbers and "L" followed by the appropriate line number or numbers.

II. BALTIMORE GAS DOCTRINE DOES NOT DEPRIVE EMPLOYEES OF THEIR SECTIONS 7 AND 9 RIGHTS

The uniform and unbroken case law cited in Petitioner's Opening Brief (p. 11-12), establishes that self-determination elections are prescribed even where the distinct group might not itself constitute an appropriate separate bargaining unit. See, e.g., Mt. Sinai Hospital, 233 NLRB 507 (1977); Duke University, 227 NLRB 1627 (1977); Metropolitan Hospital, 223 NLRB 282 (1976); Comax Telcom Corp., 219 NLRB 688 (1975); Phototype Inc., 145 NLRB 1268 (1964).

There is no authority for the NLRB's novel attempt to avoid the authority of the above cases by arguing that the employee groups which were involved in those cases "worked outside the established bargaining units for a number of

years before the issue of the representational status was raised."[5/] It is respectfully submitted that employees' election rights under the Act are not to be determined by so specious a distinctions as the NLRB suggests -- that employees have a right to vote only if they or the union first sleep on their rights sufficiently long.

Furthermore, even if the foregoing NLRB argument were correct, the instant case, even by the NLRB's own argument, involves precisely the type of situation claimed by the NLRB to be appropriate for

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5/ Brief for the NLRB in Opposition, page 8, fn. 12. This patently false argument assumes that a union's failure to seek that certain employees be included within a particular bargaining unit for a number of years is somehow a prerequisite to "ripen" election rights, which the employees did not have under the Act from the first creation of the identifiable group.

a self-determination election. It is uncontroverted that the group the union and NLRB seek to incorporate into the Union's existing unit without a self-determination election "had come into existence after [the] Union's recognition but had been knowingly excluded from the unit for a substantial period of time." (Brief for the NLRB in Opposition at page 8). APS began hiring production and maintenance employees at its Palo Verde Plant as early as 1977, three years before the filing of the petitions. (R. 29, L. 7-13; R. 64, L. 24 - R. 65, L. 10; Brief for the NLRB in Opposition at page 2).

Not a single one of the three collective bargaining agreements negotiated by APS and the Union since 1977 has included the Palo Verde employees. Article II, Section 7 of each of these agreements contains the following limiting language:

> There shall be no other classification of work or rate of pay than those mentioned in Wage Schedules attached hereto for employees within the bargaining unit. . . .

These consistent omissions, prior to the Union's formal demand for recognition, (filing of UC petition on December 15, 1980) demonstrate the type of "knowing exclusion from the unit" argued by the NLRB in its Brief to be an appropriate criterion for according employees a self-determination election.

Still further, the NLRB argues that a self-determination election is appropriate (on the basis of the cases cited by APS) when "the bargaining history demonstrates that exclusion has not resulted in an unstable bargaining relationship and . . . the parties themselves have recognized that exclusion does not interfere with the bargaining relationship."

This is precisely the case here, as the three collective bargaining contracts negotiated by and entered into by the parties (without strikes or lockouts) since 1977 demonstrate. As noted above, Palo Verde production and maintenance employees have been employed since 1977. The parties had knowingly excluded such employees from the Union's bargaining unit described in the contracts to this date. There is simply no evidence in the record which would establish that this exclusion of the Palo Verde employees from the bargaining unit has created an unstable bargaining relationship between the parties. As The Bendix Corp., 168 NLRB 371 (1967), cited by the Board (NLRB Brief at P.9) amply demonstrates, the filing by a union of a UC (Unit Clarification) Petition, does not create the

type of instablity sufficient to warrant limiting employee free choice.

Finally, the NLRB attempts to invoke the Baltimore Gas doctrine as justification for denying a self-determination election to the Palo Verde employees. Again, it must be emphasized that APS has never contended that the Palo Verde employees constitute an appropriate separate bargaining unit. Rather, it has always been APS' position that the Palo Verde employees comprise an identifiable separate group entitled to a self-determination election before it can be "incorporated" into the Union's existing single system-wide unit.

The Board has never argued, nor can it argue, that the choice between inclusion within, or exclusion from, a single existing system-wide collective bargaining unit (as opposed to establishment of a new separate bargaining unit) under-

mines the Baltimore Gas doctrine. Were this not true, the Baltimore Gas doctrine would have in effect forfeited the §§7 and 9 rights of all employees in the public utilities industry. Significant administrative case law to the contrary dispels any such notion. See, e.g., Massachusetts Electric Company, 248 NLRB 155, 158 (1980); Boston Gas Company, 221 NLRB 628, 630 (1975).

APS does not question, and has never questioned, the Baltimore Gas doctrine, that there should be a single system-wide bargaining unit for any public utility. APS says simply that separately indentifiable groups (as at Palo Verde) within the utility, which have never before been represented by the Union, have a statutory right to choose, by a self-determination election, to be represented by the Union or to remain unrepresented -- and that

this statutory right cannot be taken from them by administrative fiat.

CONCLUSION

The NLRB and the Ninth Circuit disregarded the extensive agency and judicial precedent permitting employees a self-determination election wherever such employees possess a separate group identity.

The uncontroverted evidence, although virtually ignored by the NLRB in its Brief, establishes the historical and factual predicate necessary for the conduct of a self-determination election among the Palo Verde employees, an identifiable separate group.

The law, until this case, has been clear. The position taken by the government throughout this case flagrantly violates the Act and deviates from both administrative and judicial precedents which heretofore have protected employees'

Sections 7 and 9 rights to select an exclusive bargaining representative, or to refrain from selecting one. Although the NLRB like other administrative agencies,

> is entitled to considerable deference when it exercises its "special function of applying the general provisions of the Act to the complexities" of . . . labor relations, . . . the "deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." [citation omitted] Accordingly, while reviewing courts should uphold reasonable and defensible constructions of an agency's enabling Act [citation omitted], they must not "rubberstamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the Congressional policy underlying a statute."

Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority, et al., 52 U.S.L.W. 4013, 4015 (U.S. Nov. 29, 1983), citing, NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963), American

Ship Building Co. v. NLRB, 380 U.S. 300, 318 (1965), and NLRB v. Iron Workers, 434 U.S. 335, 350 (1978).

The question before the Court is one which involves a threat to the very foundation of the Act -- the concept of a free and democratic employee choice -- and requires resolution by this Court.

RESPECTFULLY SUBMITTED this 31st day of December, 1983.

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